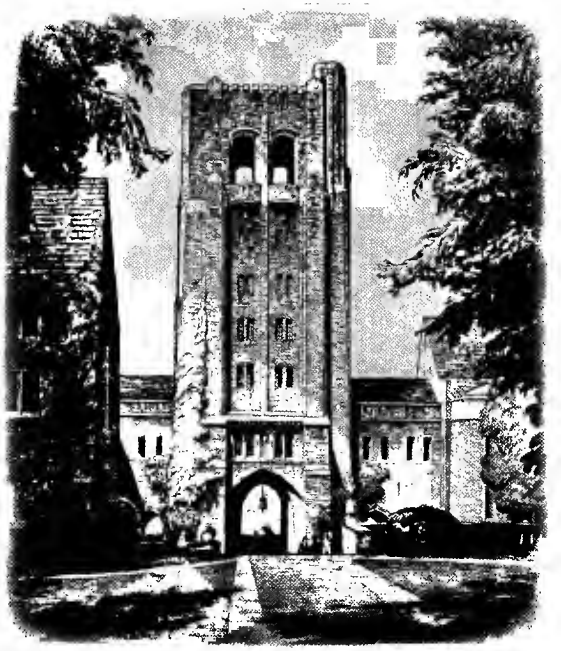

Conference of Commissioners on Uniform State Laws.

TENTATIVE DRAFTS OF AN ACT TO MAKE UNIFORM THE LAW OF PARTNERSHIP

INTRODUCTORY LETTER.

University of Pennsylvania, August 1st, 1910.

To the Committee on Commercial Law of the Conference of Commissioners on Uniform State Laws:

Gentlemen:

In 1872, England began the attempt to codify partnership law; in 1879, Sir Frederick Pollock drafted an Act for Parliament covering general and limited partnerships and providing for registration. [Pollock's Essays on Jurisprudence and Ethics, 107.] Eleven years thereafter, the present English Act, approved by Lord Justice Lindley and the Scottish authorities as declaring the present law was finally adopted [341 Hansard's Parliamentary Debates (3rd series) 1317; 342 Ibid, 183], the provision for registration being omitted and limited partnerships being left for the Act of 1907 [L. R. 45 Stat. 110].

The English Act is drawn on the collective or aggregate theory of partnership; that is, the theory that a partnership is an association of persons engaged in business, the association as such possessing no separate legal personality. The entity or legal person theory; *i. e.,* that the association does possess a legal personality distinct from the legal personalities of the members, which had existed in Scotland, was retained for that country. [See Sections of English Act and Lindley 4. The English Act on general partnerships is printed, for the convenience of reference on page 104 *infra.* When in this pamphlet it is intended to refer to a section of the English Act, the letter E is placed after the number of section, except that in Mr. Ames's notes to his draft the English Act is referred to as E. A.]

For several years your Committee has had under consideration various drafts of a Uniform Partnership Act submitted by the late Mr. James B. Ames. Mr. Ames realized the impossiblity of drafting a satisfactory Act declaring merely the existing law, because of its confusion among the States. As the Act

would necessarily change the law of many States in important particulars and of each State to some extent, he preferred to draw an Act which would state the law, not as nearly as might be to our present case law, but as he thought the law ought to be. He, of course, recognized that most of our case law, as the English case law and the English Act, proceeds on the aggregate theory of partnership. But he believed that the law of partnership would never be in a satisfactory condition until the entity or legal person theory was adopted. Accordingly he sought and obtained your permission to submit the draft of an Act drawn on that theory. In preparing his first draft he used as the basis of his work the English Act which, as stated, is drawn on the aggregate theory of partnership, changing it here and there to make the sections conform to the entity theory. Continued study, however, convinced him that an Act based on the aggregate theory and merely declaring existing case law, was not a proper declaration of the theory he had adopted. As a result in the last draft submitted by him many changes were introduced, each tending to make the draft logical throughout, and consistent with the theory of the nature of a partnership which he had adopted.

The study which has resulted in the production of the present pamphlet was undertaken with a view of assisting in the solution of the problems presented by the attempt to draft a Uniform Partnership Act. Our first endeavor was to reach the end towards which Mr. Ames was consistently working; namely, the production of a logically consistent Act drawn on the entity theory. A preliminary examination was made of the last draft submitted by Mr. Ames, hereafter called draft A. [This draft is reprinted for convenience of reference on page 83 *infra*. When in this pamphlet it is intended to refer to a section of this draft the letter A is placed after the number of the section.] The result of this examination showed that Mr. Ames had not completely eliminated or changed all those sections which he had adopted from the English Act which expressed the aggregate rather than the entity theory of partnership. It also appeared that time had not permitted him to deal adequately with several important problems, notably those relating to partnership by es-

toppel, and with those relating to dissolution, and liquidation. The "Notes on the Preliminary Study of Draft A," printed immediately after this introduction, indicate some of the principal difficulties encountered.

The result of our work on draft A is presented in draft B printed on page 7 *infra,* which is a Partnership Act drawn on the theory that a partnership is a legal entity or person distinct from the legal personalities of the several partners.

While working on draft B the number and radical nature of the alterations in existing law made necessary by the adoption of the entity theory impressed us with the desirability of also drafting an Act which would be based on the aggregate theory, so that your Committee might be in a position to compare the results of the adoption of the theory underlying most of the present case law with those resulting from that advocated by Mr. Ames. The result of this endeavor is presented in draft C, printed on page 36 *infra.*

It so happened that the final polishing of draft C was completed before the last revision of draft B. This will explain why, where both drafts are identical, and yet differ from the last draft submitted by Mr. Ames, or from the English Act, the explanations of the changes are in the notes under draft C.

It is proper to add here that we began our labors with no bias towards either the aggregate or entity theory of partnership; but we had, and still have, a strong conviction that the confusion in the present case law, where such confusion exists, is largely due to a failure on the part of many judges to adopt one theory and apply it consistently to different situations; and that the prime requisite of any Act is that it shall adhere throughout to one theory of the nature of a partnership. The law of any business association is, we believe, capable of being made comparatively simple and clear; but this, however desirable, can only be accomplished by adhering with logical consistency to some one idea of the nature of the particular association under discussion. We do not wish to minimize the importance of adopting a theory of partnership which will, in the long run, most nearly correspond to the actual conditions and needs of the business world, but we do believe that in partnership the certainty of our business

law is even more important than its theory, and that, therefore, the chief end which should be attained by a Uniform Partnership Act, is not so much the triumph of one theory rather than another, as the elimination of the confusion of theories found in much of our present case law.

While certain definite ideas as to limited partnerships have been worked out, time has not permitted their incorporation in the present pamphlet. Suffice it to state, that the present English Act of 1907 (*supra*) deserves thoughtful consideration. This English Act, the work of Sir Frederick Pollock, has met with the approval of Professor Burdick. (Limited Partnerships, 6 Michigan Law Review, 525, 1908.)

Respectfully submitted,

James B. Lichtenberger,
William Draper Lewis.

Notes on the Preliminary Study of Draft A.

Note 1.—Under section 1 A, a partnership is defined as a legal person formed by the association of two or more individuals, while under section 4 A, copied from section 4 E, the persons who have entered into partnership with one another are called the firm, their business is carried on under the firm name, title to all partnership property vests in the firm and all obligations are by or to the firm. Under section 4 A the firm would appear to denote the partners collectively as under the English Act, and not the legal person as it should under the theory adopted. [See section 9 (1) B for an attempt to state the subject matter of 4 A in accordance with the entity theory.]

Note 2.—Section 2 (1) A, declares that persons who are not partners as between themselves are not partners as to third persons except as declared by section 13 A. Section 13 A declares when persons, who are not partners, are liable to third persons. The draft does not state whether the person held out as a partner can be an agent of the other persons in the same manner and to the same extent as though he were a partner; neither

does it settle his rights in partnership property, his right to join in an action, or his rights to indemnity or to compel the application of the partnership property to the payment of the resulting liabilities. [These problems are treated under sections 19 B and 18 C and incidentally in other sections of the drafts B and C.]

Note 3.—From a study of the draft it cannot be said that the admission or retirement of one or more partners affects the existence of the legal person or the firm. By section 5 (3) A, upon every change of members a new certificate signed by all the members of the new firm must be filed. Under section 13 (2) A, where the business is continued in the old firm name it is implied that the partnership continues to exist, merely the liability of the deceased partner's estate being limited. Under section 16 A, a person is mentioned as being admitted into an existing firm and a retired partner as contracting with the firm as newly constituted, without indicating whether it is one and the same or a new firm. Section 17 A appears to imply that a change in the membership creates a new and different firm. Under section 22 A a partner has only a right to receive in cash his proportion of the surplus remaining after all claims of firm creditors have been satisfied, which implies that the affairs of the firm must be liquidated and wound up upon the retirement of any partner before he has a right to bring an action for what may be due him; yet under section 43 A the amount due him with respect to such interest becomes a debt due on the date of death or dissolution. Under section 24 (7) A a new partner is mentioned as being admitted into the firm with the consent of all the partners; and under section 25 A a partner is described as being expelled from the firm, the implication being that the firm continues. Section 18 A assumes that the retirement of a partner dissolves the firm as to him, but not as to the other partners; yet under section 22 A the retiring partner has no right to receive anything until all firm debts are paid. Whether the retiring partner has the rights set forth under section 39 A is not clear. If he has the right to wind up the business the difficult problems arising in cases where there is a dissolution or attempted dissolution in contravention of the partnership agreement are not dealt with,

so also where under section 25 A a partner is expelled from the firm, the resulting rights are uncertain. Section 33 A treats a partnership as dissolved by the death or bankruptcy of one of the partners without notice thereof, yet section 36 (5) A appears to comtemplate the partnership as continuing to do business. Sections 42 A and 43 A also appear to provide for the dissolution of the firm and yet for its continued activities. There is apparently, therefore, considerable confusion as to the facts of dissolution and termination of the firm. [These problems are treated and discussed under Part VI of draft B and Part V of draft C. Since it is necessary for every retiring partner to give notice of the dissolution so as to terminate his liability under either theory, and under section 22 of draft A all firm claims must be satisfied before any partner has the right to receive what is due him with respect to his interest, it appears to have been Mr. Ames's intention to provide that every retirement of a partner should cause a dissolution. Under the aggregate theory such dissolution is necessary so as to terminate the liability and the agency. In both drafts B and C we have, therefore, adopted the principle that the retirement of a member of a firm produces a dissolution. To continue the firm after the retirement of a member, even where the entity theory is adopted, apparently involves endless complications. The admission of a new partner does not cause any such complications and so under drafts B and C it is provided that no dissolution results on the admission of a new partner].

Note 4.—Section 12 A declares that the partners are contributories to the firm. But it is not clear whether this obligation to contribute to the deficiency of firm assets is part of the "assets of the firm." [This question, which is of great importance in bankruptcy proceedings, is dealt with under section 45 B.]

DRAFT B.

A PARTNERSHIP ACT DRAWN ON THE THEORY THAT A PARTNERSHIP IS A LEGAL ENTITY OR PERSON.

[For the reasons stated in the Introductory Letter the notes to this draft, where the section is similar to the corresponding section of draft C, merely refer to the note in draft C. Where the section differs from the corresponding section of draft C, the difference, and the effect of the section as stated in this draft on the existing law, is pointed out in the note in this draft.

The order and arrangement of the sections of the Act are not affected by the theory of the draft. For this reason, the discussions of the order and arrangement of draft C are equally applicable to this draft and are not set forth in the notes under this draft.

The reasons for the omission of some sections found in draft A and the insertion of other sections not found in draft A appear in the notes under draft C where the reasons are not given under this draft.]

PART I.

PRELIMINARY PROVISIONS.

Section 1. [Name of Act.] This Act may be cited for all purposes as the Uniform Partnership Act.

Section 2. [When Act Takes Effect.] This Act shall take effect at twelve o'clock noon on the day of one thousand nine hundred and

Section 3. [Legislation Repealed.] All acts or parts of acts inconsistent with this Act are hereby repealed. Such acts and parts of acts are specified in schedule A.

Section 4. [Definition of Terms.] In this Act, unless the context is repugnant to such construction:

"Court" includes every Court and Judge having jurisdiction of the cause.

"Business" includes every trade, occupation, or profession.

"Person"includes natural or corporate persons, partnerships and other associations.

"Bankrupt" includes every person declared bankrupt under the Federal Bankrupt Act or insolvent under any State Insolvent Act.

Section 5. [Rules of Construction.] (1) The rule of the common law, that statutes in derogation thereof are to be construed strictly, has no application to this Act.

(2) The provisions of this Act shall be so interpreted and construed as to affect its general purpose to make uniform the law of those States which enact it and to promote justice; and a substantial compliance with its provisions shall not render a special partner liable as a general partner.

(3) The provisions of this Act shall not be construed so as to impair the obligations of any contract existing when the Act goes into effect nor to affect any action or proceedings begun or right accrued before this Act goes into effect.

Section 6.—[Rules for Cases not Provided for in this Act.] In any case not provided for in this Act, the rules of common law and equity including the law merchant, shall govern.

Corresponding sections, Part I, C and Part VI, A. [See sections 45-50 E.]

These sections are identical with the sections of Part I, C and amend the sections of Part VI, A for the reasons set forth under Part I, C.

PART II.

NATURE OF PARTNERSHIP.

Section 7. [Partnership Defined.] (1) A partnership is a legal person formed by the association of two or more individuals for the purpose of carrying on a business with a view to profit.

Corresponding sections, 1 (1) A, 1 (1) E and 7 (1) C.

The circumstances which dissolve the legal person cannot be determined from the wording of this section. Whether the legal person created by three is dissolved by the retirement of one, the retirement of two, or the introduction of a fourth, are questions which, not being settled by this section, must be definitely provided for in other sections. In this draft and in draft C these questions are taken up under Part VI on Dissolution and its Consequences. See *note* 2, on Preliminary Study of Draft A, *supra*, p. 4.

(2) But any association formed under the provisions of any other statute is not a partnership under the provisions of this Act unless so declared by that statute.

Corresponding sections, 1 (2) A, 1 (2) E and 7 (2) C.
The corresponding provision of section 1 (2) A is amended for the reasons set forth under section 7 (2) C.

Section 8. [Rules Determining the Existence of a Partnership.] In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Except as expressly provided by section 19 of this Act, persons who are not partners as to each other are not partners as to third persons.

(2) Persons are partners as to each other when by agreement, express or implied as a fact, all the parties have a right to take part in the conduct and management of the business to the exclusion of persons not parties to the agreement and to compel the application of the property employed in the business to the payment of all liabilities arising out of the business.

(3) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(4) The sharing of gross returns does not of itself create a partnership, whether the person sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(5) The receipt by a person of a share of the profits of a business or of a payment contingent on or varying with the profits of a business raises a presumption of the existence of a partnership to be rebutted by other evidence; but:

(*a*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the profits of a business does not of itself make him a partner in the business or liable as such;

(*b*) A contract for the remuneration of an employee or agent or landlord of a person engaged in a business by a share of the profits of the business does not of itself make

the employee or agent or landlord a partner in the business or liable as such;

(*c*) A person being the legal representative, widow, or legatee of a deceased partner, and having by way of annuity or otherwise a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or lable as such;

(*d*) The advance of money by way of loan to a person or partnership engaged or about to engage in any business on a contract with that person or partnership that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or in the partnership carrying on the business or liable as such;

(*e*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the good-will of a business or other property is not by reason only of such receipt a partner in the business or liable as such.

Corresponding sections, 2 A, 2 E and 8 C.
This section is identical with section 8 C. It differs in certain particulars from 2 A for the reasons set forth under section 8 C.

Section 9. [The Firm an Entity Distinct from the Partners.] (1) The legal personality of the partnership is distinct from the legal personalities of the partners and is for the purposes of this Act called a firm, and the name under which its business is carried on is called the firm name.

Corresponding sections, 4 (1) A, 4 (2) E, and 9 C.
The corresponding section of draft A is altered so as to make this draft logical with itself and to declare the idea expressed in the caption of section 4 A. If the firm is a legal person or entity distinct from the partners, the term "firm" is applied, not to the partners collectively, but to the legal person or entity. If the legal person owns all the property and incurs all the obligations as the subsequent provisions of the section declare, then the business is not "their" business but "its" business.

(2) It shall be unlawful to use in the firm name any general term which does not represent an actual partner or the

name of any person not actually a partner unless (*a*) such person or his legal representative has consented thereto, or (*b*) such name is also the name of one of the partners so using it. Every partner using such firm name commits a misdemeanor and shall be liable to imprsonment for a term not exceeding two years.

Corresponding section 9 (2) C.
This provision is explained under section 9 (2) C.

(3) The partnership property is all property and rights, and interests in property originally contributed to the partnership stock, or subsequently acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business. Unless the contrary intention appears, property, whether real or personal, acquired with partnership funds, is deemed to be partnership property.

Corresponding sections 20 and 21 A and 20 and 21 E and 9 (3) C.
This provision is identical with the corresponding sections, except that under this section the property is not merely "called partnership property," but "is partnership property." This alteration is due to the fact that under the English Act and under draft C, the title to the property vests in the constituent members and is for convenience of designation "called partnership property," while under the present draft all right and title is in the legal person or entity.
The definition is inserted in the present section for the reason set forth under section 9 (3) C.

(4) The legal title to partnership property is vested in the firm, if property acquired under similar circumstances by a natural person would vest in such person. In all other cases, the partnership property belongs to the firm as a *cestui qui trust* or equitable owner.

Corresponding provision, 4 (2) A.
This provision is identical with the corresponding provision. The results produced are not in accordance with the present law. They are, however, the logical result of the entity theory.
The necessity for changing the wording of 4 (1) A to that adopted in this draft under (1) of this section becomes apparent in view of this paragraph.

(5) Upon obligations in favor of the firm against a stranger or against one or more of the partners, the firm as such, is the obligee; and upon obligations in favor of a stranger

or of one or more of the partners against the firm, the firm as such is the obligor.

Corresponding provision, section 4 (3) A.

This provision is identical with the corresponding provision of Draft A. Though it entirely changes the present law (30 Cyc., 533-556) it is the logical result and one of the most important, of the adoption of the theory of this draft. Under the theory, partners would have the same right to deal with the firm, and the same rights of action against the firm, as third persons, subject only to the express prohibitions, if any, contained in the Act. They would be no longer confined to an account. Their claims against the firms would rank equally with the claims of third persons, except in as far as this result is prevented on dissolution by section 45, *infra*.

(6) Actions upon claims in favor of or against a firm must be brought in the firm name, the process against the firm being served either upon one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there.

Corresponding provision, section 4 (4) A.

This provision, which is identical with the corresponding provision of draft A, is the logical result of the previous provisions and the theory of this draft. The partners are merely agents upon whom service is made or by whom defences are made and actions are brought. They are in no sense parties to the suit for the obligation is not to or against them. They are not bound by the judgment obtained by such suit, but must be sued in separate and subsequent actions, for under section 12 A, the partners are not liable before the writ of execution against the firm has been returned unsatisfied in whole or in part.

In the Federal Courts the fact that the partnership is a new legal person does not make it a citizen of the State for the purpose of conferring jurisdiction on those courts. [*Great Southern* v. *Janes*, 177 U. S. 449, 454 (1900); *Macey* v. *Macey*, 135 Fed. 725 (1905); *Saunders* v. *Adams Express*, 136 Fed. 494 (1905); *Bruett* v. *Austin Ca.* 174 Fed. 668 (1909)]. See note to 21 (1) C.

Section 10.—[Registration of Partnerships.] (1) Every partnership transacting business in this State must record in the office of the Secretary of State and file with the recorder of deeds in the jurisdiction in which its principal office or place or business is situated, a certficate stating the firm name of the partnership, the general nature of its business, and the full name and residence of each member of the partnership.

Corresponding provision, section 5 (1) A.

This provision differs from the corresponding provision in requiring

that the certificate be filed with the recorder of deeds. This is the general requirement as to corporations. It is even more applicable to partnerships than to corporations because partnerships usually conduct the smaller businesses, confined to a single jurisdiction rather than to the whole State. "Doing business within the State" is a corporate expression and must be construed under the corporate cases.

It would appear that a requirement for registration is essential under the theory of this draft. Yet, it is admitted that the provision as drawn, presents serious difficulties, which we have not been able to solve to our satisfaction. If every partnership must register the full name of each member of the firm, then, if the record is to be serviceable to third persons, there cannot be secret and dormant partners as provided for by the subsequent sections of this Act. If it be provided that the names of such partners as are to be secret and inactive need not be recorded, then section 11, *infra*, should declare that only such partners, as are registered shall be general agents of the firm; and if any partner, who is not registered intends to assume an active part in the business, such fact must be recorded.

(2) The certificate described in the foregoing paragraph must be signed by all the partners and acknowledged before some officer authorized to take acknowledgements of conveyances of real estate.

Corresponding provision, section 5 (2) A.

This provision is identical with the corresponding provision except that it declares that the certificate must be signed by all the partners, thus making "the partners" of the corresponding provision definite.

(3) Upon every change in the membership of a partnership transacting business in this State, a new certificate must be recorded in the same form and manner as provided in the foregoing paragraphs ~~(1)~~ of this section.

Corresponding provision, section 5 (3) A.

The corresponding provision has been altered to conform to paragraph one of this section.

(4) The Secretary of State and every recorder of deeds shall each keep a register of the names of firms and persons mentioned in the certificates recorded or filed in his office pursuant to this Act, entering in alphabetical order the names of every such partnership and of each partner interested therein; and shall indicate the termination of the partnership or of the interest of any partner therein upon the presentation of an affidavit to that effect by the partner whose interest is terminated or by all the partners.

Corresponding provision, section 5 (4) A.

This provision modifies the corresponding provision to conform to paragraph one of this section and provides means for the termination of any effect the record may have. If the record is to have any effect, it should be given vital force and third persons should be enabled to rely upon it. Where the partnership is for a term stated, the authority of the partners to act for the firm should continue for the term stated as to persons having knowledge of the record unless such partnership's termination is recorded or actual knowledge or notice is had of such termination. Where the term is not stated the same rule should apply as to persons who rely upon the record, if not as to all persons

The provision in the corresponding section that an official copy shall be evidence is omitted as unnecessary.

(5) Every partnership doing business in this State, domiciled without this State and having no regular place of business within this State, must file in the office of the Secretary of State a designation of some person upon whom process, issued by authority of or under any law of this State, may be served. Such process may be served on the person so designated, or, in the event that no such person is designated, then on the Secretary of State and the service is a valid service on such partnership as to any cause of action arising in this State.

No corresponding provision.

This provision is adopted from the California Civil Code (sec. 2472). It is the ordinary provision as to corporations and would appear to be logically applicable to this legal person.

(6) No partnership doing business contrary to the provisions of this section shall begin or maintain any action upon or on account of any contract made or transaction had, after this Act goes into effect, with the partnership until the certificate prescribed by this section has been filed; nor shall such action be begun or maintained by any assignee or successor in interest of such partnership unless the transfer was by operation of law and not by act of the partners.

Corresponding provision, section 5 (5) A.

This provision amends the corresponding provisions by the insertion of the words "after this Act goes into effect" so as to prevent any constitutional question; and by the words "nor shall any such action be begun or maintained by any assignee or successor in interest of the partnership unless the transfer was by operation of law and not by act of the partners." The corresponding provision closely resembles the provision of the California code (sec. 2468) which has been evaded because of the omission of the words added by this provision. This is a penal provision [*Cochran* v. *Hirsh*,

6 Com. Pleas, Ohio, Dec. 41 (1896)] and will be construed strictly. It has no application to a tort action [*Ralph* v. *Lockwood*, 61 Cal. 155 (1882)]. Filing the certificate cures the disability [*Hartzell* v. *Warren*, 5 Ohio Dec. (Circuit) 183 (1896)]. The assignee may sue upon such a contract or transaction [*Cheney* v. *Newberry*, 67 Cal. 126 (1885)], even if such assignee be one of the partners [*Gray* v. *Wells*, 118 Cal. 11, (1897)]. This provision, even as amended will not be effective in the Federal Courts if the present decisions hold. [*In re* Farmer's Supply Co., 170 Fed. 502 (1909).]

PART III.

RELATIONS OF THE FIRM TO PERSONS DEALING WITH IT.

Under the caption, "Relations of Partners to persons dealing with them as such," draft A includes those sections which relate to the obligations of the firm or entity to third persons, and also the nature and extent of the partners' liability for the acts of the entity. As under the theory of this draft these are two distinct problems, they are dealt with under separate Parts, this Part and Part IV, *infra.*

Section 11. [Partner Agent of the Firm as to Partnership Business]. Every partner is an agent of the firm for the purpose of the business of the firm; and the acts of every partner who does any act, including the execution in the firm name of deeds of obligation or conveyance, for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm, unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing has actual knowledge or notice of the fact that he has no authority.

Corresponding sections 6 A, 6 E, and 10 C.

This section amends the corresponding section of draft A by declaring that a partner's acts "bind the firm of which he is a member" instead of "the firm of which he is a member and his other partners" as declared in section 6 A. Since under the theory of this draft every partner is merely an agent for the firm, his acts bind only the firm. The partner's liability results, not from the act of an agent, but in law as declared in section 18 of this Act. There is no mutual agency under the theory of this draft, at least if it is to be logical with itself.

"Or does not know or believe him to be a partner" of section 6 A, is omitted for the reasons set forth under section 10 C.

"Has actual knowledge or notice" is employed instead of "Knows." Notice should be as effective as knowledge. The term notice is defined under section 38 (4) of this Act.

The omission of section 7 A is explained in the introductory note to Part III, C.

Section 12. [Firm not bound by Acts of a Partner without the Scope of Firm Business.] (1) Where one partner pledges the credit of the firm for a purpose not connected with the ordinary course of business of the kind carried on by the firm, the firm is not bound unless he is in fact specially authorized by the firm, as shown by the consent of the other partners, or unless the act is necessarily done for the preservation of the business or property of the firm; but this section does not affect any personal liability incurred by any individual partner.

Corresponding sections 8 A, 7 E and 11 (1) C.
The words of 8 A "unless he is in fact specially authorized by the other partners" are changed to "unless he is specially authorized by the firm, as shown by the consent of the other partners." Since, under the theory of this draft, the principal is the legal person and not the partners, all authority in the partners to act for the firm must be derived from the firm. This modification of draft A does not produce any change in results.
The other alterations made by this provision are made for the reasons set forth under section 11 (1) C.

(2) In particular a partner has no authority to do any of the following acts unless his co-partners have wholly abandoned the business to him or are incapable of acting:

(*a*) To make any assignment of the partnership property or any portion thereof to a creditor or to a third person in trust for the benefit of a creditor or of all the creditors;

(*b*) To dispose of the good-will of the business;

(*c*) To dispose of the whole of the partnership property at once unless it consists entirely of merchandise;

(*d*) To do any act which would make it impossible to carry on the ordinary business of the partnership.

Corresponding provision, section 11 (2) C.
This provision is adopted from the California Civil Code (sec. 2430) for the reasons set forth under section 11 (2) C. It is identical with that provision except that the last two paragraphs are omitted. These are: "To confess a judgment" and "To submit a partnership claim to arbitration." These may be acts within the ordinary course of business, but they cannot under the theory of this draft affect the individual liability as under the common law, and so that reason for their insertion does not exist.

Section 13. [Restrictions upon the Authority of a Partner.] If it has been agreed between the partners that any restrictions shall be placed upon the authority of any one or more of them to bind the firm, no act done in contravention of the agree-

ment is binding on the firm with respect to persons having actual knowledge or notice that the act is in contravention of the agreement.

Corresponding sections 9 A., 8 E. and 12 C.
This section is identical with section 12 C and ~~makes one~~ amendment ~~in~~ section 9 A for the reasons set forth under section 12 C.

Section 14. [Firm Bound by the Admission of a Partner.] An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Act is evidence against the firm.

Corresponding sections 14 A, 15 E, and 13 C.
This section is identical with section 13 C and amends section 14 A for the reasons set forth under section 13 C.

Section 15. [Notice to Partner is Notice to Firm.] Actual notice to a partner as such of any matter relating to partnership affairs, and the notice to the partner acting in the particular matter implied from his knowledge acquired as a partner or then present to his mind, operate as notice to the firm except in the case of a fraud on the firm committed by or with the consent of that partner.

Corresponding sections 15 A, 16 E, and 14 C.
This section is identical with section 14 C and amends section 15 A for the reasons set forth under section 14 C.

Section 16. [Firm Bound by a Partner's Wrongful Act or Omission within the Scope of his Authority as Conferred by this Act.] Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of the firm, as shown by the consent of the other partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Corresponding sections 10 A, 10 E, and 15 C.
This section amends the corresponding sections so as to make it conform to the theory. Since the principal of the partner is the firm and not his co-partners, he must derive his authority from the firm and not from the co-partners and as a result the present section reads "With the authority of the firm" instead of "with the authority of his co-partners" as declared in the corresponding sections. Since the firm or legal person is separate and

distinct from the partners and is capable of having contract relations with the partners, logically tort liability may be incurred by it with respect to the partners through the acts of its agents. Perhaps, however, the clause "not being a partner in the firm" may be justified as an extension of the fellow-servant doctrine.

Section 17. [Firm Bound by Partner's Breach of Trust.] In the following cases; namely—

(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b*) Where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss.

Corresponding sections 11 A, 7 E, and 16 C.

This section is identical with the corresponding sections except that the caption follows that of 16 C.

PART IV.

NATURE AND EXTENT OF LIABILITY OF PARTNER.

Section 18. [Partner's Liability as Contributor.] (1) Each partner is liable jointly with his co-partners and also severally to make good any deficiency of the firm assets necessary to satisfy any claim for which the firm is liable except as provided by this Act.

(2) Any person whose writ of execution on the judgment, order or decree against the firm, is returned unsatisfied in whole or in part, or the representatives of the firm creditors in bankruptcy or insolvency proceedings, may enforce this liability to the extent of the deficiency of the firm assets.

Corresponding sections 12 A, 9 & 12 E, and 17 C.

This section entirely rejects the form and part of the substance of section 12 A. The first paragraph of the present section defines the character of the liability and the second paragraph declares when and by whom the liability may be enforced. Under the theory of this draft the liability of the partner for the contract or tort of the firm is rightfully joint and several; for there is no direct obligation in the partners for performance or non-per-

formance, but all such obligation is in the firm. The entire liability of the partners is to contribute towards any deficiency of the firm assets. The defence of any partner does not concern any other partner or go to the substance of the cause of action; but goes merely to the question of contribution, a personal matter to the particular partner. Such defences should be that he is not now and was not when the liability of the firm accrued, a member of the firm; or that he has exonerated himself as provided by this Act. All these defences are personal and not such as to require a joint action or defense.

The exceptions provided for by the last clause of the first paragraph are those declared in section 20, enabling an incoming partner to avoid existing liability, section 21, enabling a partner to avoid future liability, section 39, concerning liability after dissolution, and secton 42, concerning discharge from liability existing on dissolution.

The term "exhaustion of firm assets," employed in sections 12 and 13 A has been found in only one case [*Globe Publishing Co.* v. *Baus*, 41 Neb. 175, 27 L. R. A. 862 (1894)], which defines "exhaustion" as denoting that the execution issued on the judgment or decree has been returned unsatisfied. Since this is not the common meaning of exhaustion and confusion may be produced; and, since a partner should not be able to vex a judgment creditor whose writ of execution against the firm has been returned unsatisfied in whole or in part by a plea of firm assets in the same or any other jurisdictions, the wording of the present provision alters that of section 12 A.

This section, as well as the corresponding section of draft A is, of course, entirely new. That the partners are not parties to, or directly liable for firm debts, would appear, on consideration, to be the necessary result under the theory of these drafts.

Section 19. [Liability as a Partner by Estoppel.] (1) Where a person by words spoken or written or by conduct represents himself or consents to another representing him as a partner in a particular firm or in a particular business with one or more persons not actual partners, he is liable with the members of the existing firm in the same manner and to the same extent as though he were a member of the firm, or jointly and severally with the persons represented to be partners and not actual partners in an existing firm, to any person who relys on the representation. Any or all future liability arising under this provision may be avoided by giving notice as provided by section 21.

(2) Where a person has been thus represented to be a partner in an existing partnership or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact with respect to persons who rely on the representation. Where all the members of an existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is merely

the joint act or obligation of the person acting and the persons consenting to the representation.

(3) Where all the members of an existing partnership consent to the representation, the person represented to be a partner is entitled as though he were a partner, subject to any agreement, to have the partnership property, if there is any, applied in payment of any liability incurred by him because of the representation; and for that purpose he may apply to the Court to wind up the business and affairs of the partnership if necessary.

(4) The continuation of the partnership business in the old firm name with or without the consent of the representatives of a deceased partner does not of itself make the estate or effects of the deceased partner or his executor or administrator liable for any partnership debt contracted after the partner's death.

Corresponding sections, 13 A, 14 E, and 18 C.

This section is identical with section 18 C, except for the changes in (1) due to the theory of this draft. All the amendments to 13 A are intended to be in accordance with the doctrines of estoppel [Everest and Strode on Estoppel, (Eng. 1909) 1, 325, 341; Ewart on Estoppel, 10, 22, 88, 187; Biglow on Estoppel, 24, 25, 535.] Since the nature of the liability is declared in the preceding section where there is a partnership, it is not declared in paragraph one. But where there is no partnership in fact, then there are no firm assets and this Act does not apply unless so declared. To this end paragraph one declares that the liability is joint and several where there is no partnership in fact, thus giving effect to the representation that there is a firm, but recognizing the fact that there are no firm assets. The other provisions of this section are identical with those of section 18 C; are new; and are fully explained under section 18 C.

Section 20. [Liability of an incoming Partner.] A person who is admitted into an existing firm does not thereby become liable under section 18 of this Act for anything done by the firm before he became a member therein.

Corresponding sections 16 (1) A, 16 (1) E, and 19 C.

This section amends the corresponding section of draft A and adheres to the principle adopted in section 19 C for the reasons there set forth. Under this section the admission of a new partner does not affect the existence of the firm or its liabilities and obligations. Under the definition of partnership property (sec. 9), the property contributed by the incoming partner becomes partnership property. Any right of action or judgment against the firm acquired before the admission of the new partner, is not affected thereby; and the judgment thereon, whether the cause of action arose before or after the admission of the new partner, binds the partnership property, including that contributed by the incoming partner. But the incoming partner is not liable personally for the claims which arose before he was admitted. In this manner the result produced by section 19 C is also produced by this section.

Section 21. [Exoneration from Future Liability.] (1) A partner may exonerate himself from liability as to any particular contract or transaction to any third person by giving notice to such third person, before liability is incurred, that he assumes no liability as to such contract or transaction.

(2) A partner may exonerate himself from all liability to third persons or to his co-partners or the firm on account of any future contract or transaction by giving notice as provided by this Act, to third persons and to his co-partners that he dissolves the firm.

(3) One liable as a partner by estoppel may exonerate himself from future liability to third persons and his apparent co-partners as to any particular matter or as to all future contracts and transactions of his apparent co-partners in the same manner as though he were a partner in fact.

(4) The foregoing provisions of this section do not in any manner affect any liability to the co-partners or to the apparent partners for any damages caused to them by reason of the breach of any contract.

Corresponding sections 18 A and 20 C.

This section agrees with section 20 C except for slight verbal changes because of the difference in the theory of this draft and differs from section 18 A for the reasons set forth under section 20 C.

Section 22. [Revocation of Guaranty by Change in Firm.] A continuing guaranty given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of an agreement to the contrary, revoked as to any future transactions by any change in the constitution of the firm to which or of the firm in respect of the transactions of which, the guaranty was given.

Corresponding sections 17 A, 18 E, and 23 C.

This section is identical with section 23 C, which amends section 17 A, by the omission of the words "or obligation." A discussion of the section appears under section 23 C.

PART V.

RELATIONS OF PARTNERS TO THE FIRM AND TO ONE ANOTHER.

Section 23. [Relations Varied by General Consent.] The mutual rights and duties of the firm and the partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Corresponding sections 19 A, 19 E, and 24 C.
This section is identical with section 19 A.

Section 24. [Rules Determining the Rights and Duties of Firms and Partners.] The interest of partners in the partnership and their rights and duties in relation to the partnership shall be determined, subject to any agreement, express or implied between the partners, by the following rules:

(1) Each partner is entitled to repayment of his contribution, whether by way of capital or advances, to the partnership property and to share equally in the profits and surplus remaining after all partnership liabilities are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the firm according to his share in the profits.

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a*) In the ordinary and proper conduct of the business of the firm; or,

(*b*) In or about anything necessarily done for the preservation of the business or property of the firm.

(3) A partner making for the purposes of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the legal rate per annum from the date of the payment or advance.

(4) A partner is not entitled to interest on his share of the capital except from the date repayment should be made.

(5) All partners have equal rights in the management and conduct of partnership business.

(6) No partner shall be entitled to remuneration for acting in the partnership business.

(7) No person may be introduced as a partner in the business without the consent of all the partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement may be done without the consent of all the partners.

(9) The partnership books shall be kept at the place of business of the partnership (or the principal place if there is more than one) and every partner shall have access to and may inspect and copy any of them.

Corresponding sections, 24 A, 24 E, and 25 C.
This section is identical with section 25 C and amends section 24 A for the reasons set forth under section 25 C.

Section 25. [Partnership Property to be Used for Partnership Purposes.] All partnership property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

Corresponding sections 20 A, 20 E, and 26 C.
This section is identical with section 26 C.

Section 26. [Duty of a Partner to Render Accounts.] Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representative, when required by the partnership agreement or by law.

Corresponding sections, 28 A, 28 E, and 27 C.
This section is identical with section 27 C and amends section 28 A for the reasons set forth under section 27 C.

Section 27. [Partners Accountable as a Fiduciary.] (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of the partnership property, name or business connection.

(2) This section applies also to the representatives of a de-

ceased partner engaged in the liquidation of the partnership affairs as legal representative of the deceased partner.

Corresponding sections, 29 (1 and 2) A, 29 (1 and 2) E, and 28 (1 and 2) C.

This section is identical with section 28 C and amends section 29 A for the reasons set forth under section 28 C.

Section 28. [Partner Accountable for his Profits from a Rival Business.] If a partner without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

Corresponding sections, 30 A and 30 E, and 29 C.
This section is identical with section 29 C.

Section 29. [Nature of a Partner's Interest.] A partner has no beneficial interest, legal or equitable, in any specific property whether real or personal belonging to the partnership, but only a right to receive in cash his proportion of the surplus of the firm assets remaining after all claims of firm creditors have been satisfied.

Corresponding sections, 22 A and 22 E, and 30 C.
This section is identical with section 22 A, which is the logical result of the theory and of this draft.

Section 30. [The Assignment of a Partner's Interest.] (1) An assignment by a partner of his interest in the partnership does not of itself dissolve the firm, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require an account of the partnership transactions or to inspect the partnership books, but merely entitles the assignee to receive the share of the profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by all partners.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself

and the other partners, and for the purpose of ascertaining that share to an account as from the date of the dissolution.

Corresponding sections 31 (1 and 2) A and 31 (1 and 2) E and 31 (3 and 4) C.

This section is identical with the corresponding provisions of section 31 C, which makes slight verbal changes upon section 31 A for the reasons set forth under section 32 C.

Section 31. [Partner's Interest Subject to Changing Order.] (1) An attachment or execution shall not issue against partnership property except on a claim against the firm.

(2) On the application of any judgment creditor of a partner, the Court which entered the judgment, order, or decree may make an order charging the partner's interest in the partnership with payment of the amount of the judgment debt, or of any unsatisfied amount thereof, with interest thereon; and may by the same or any subsequent order appoint a receiver of that partner's share of profits (whether already ascertained by an account or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries and give all other orders and directions which might have been directed or given if the charge had been made in favor of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The firm through the other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4) Process for any order under this section shall be served on the judgment debtor and his partners or such of them as are within the jurisdiction, and such service shall be a good service on all the partners. Process on the application of any partner shall be served on the judgment creditor and the other partners or such of the other partners within the jurisdiction as shall not concur in the application; such service shall be a good service on all partners. All orders made on such process shall be served in like manner and with like effect.

Corresponding sections, 23 A and 23 E, and 30 (6) and 32 C.

This section, except for slight verbal changes, is identical with section 23 A. The provision as to service of process, which is inserted in section 32 (4) C, is desirable under this section also.

Section 32. [Continuance of a Partnership Beyond Fixed Term.] (1) Where a partnershp, entered into for a fixed term, is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

Corresponding sections, 27 A, 27 E, and 33 C.
This section is identical with section 33 C, and amends section 27 A, for the reasons set forth under section 33 C.

PART VI.

DISSOLUTION AND ITS CONSEQUENCES.

The policy set forth under the sections of Part V, of draft C, is adhered to in this draft. To this end the sections of this draft are, except as indicated in the notes, identical with the corresponding sections of draft C, instead of those of draft A. A full discussion will be found accompanying the sections of draft C.

Section 33. [Dissolution Defined.] The retirement of any one or more of the partners produces a dissolution of the partnership.

Corresponding section 34 C.
This section is the same in substance as the corresponding section, though differently expressed because of the theory of this draft.

Section 34. [Partnership Not Terminated by Dissolution.] On dissolution the partnership is not terminated, but continues until settlement or liquidation of all partnership affairs is completed.

Corresponding section 35 C.

Section 35. [Method of Dissolution.] The dissolution of a partnership is produced:

(1) Rightfully under the partnership agreement,—

(*a*) By the manifest intention of any or all of the partners at the termination of the definite term or particular undertaking specified in the agreement;

(*b*) By the express will of any or all the partners when no definite term or particular undertaking is specified;

(*c*) By the express will of all the partners, not having suffered their interests to be charged for their separate debts, whether before or after the termination of the specified term or particular undertaking;

(*d*) By the expulsion of any partner from the business bona fide in accordance with such power conferred by the partnership agreement.

(2) In contravention of the partnership agreement, where the circumstances are not such as to permit a dissolution under any other provision of this section, by the express will of any one or more of the partners at any time.

(3) By the happening of any event which makes it unlawful for the business of the firm to be carried on.

(4) By the death of any partner.

(5) By any partner being declared a bankrupt.

(6) By decree of Court.

Corresponding sections, 18, 25, 26, 32, 33, 34 A, 25, 26, 32, 33, 34 E, and 36 C.

This section differs from the corresponding sections of draft A to the same extent as section 36 of draft C for the reasons set forth under that section. In addition, it differs from all the corresponding sections in part (3) because of the theory of this draft. Dissolution by the happening of any event which makes it unlawful for the business to be carried on "by the members in partnership" of sections 34 A and 36 C has been omitted. For if the fact that it is unlawful for the members to carry it on in partnership produces any dissolution of a partnership then it should also produce a termination of a corporation which is not the present result. Since the contracts and transactions are not with the individual members either jointly or severally but with the legal person, the question is whether it is lawful for it to exist and not whether it is lawful for the members to carry on the business in partnership. War, for instance, should not affect the contracts of the firm where one member is an alien, because the alien member is no party to the contract.

Section 36. [Dissolution by Decree of Court.] On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a*) When a partner has been found lunatic by inquisition, or is shown to the satisfaction of the Court to be of unsound mind, in either of which cases the application may be made either on behalf of that partner by his committee or next friend or person having title to intervene or by any other partner;

(*b*) When a partner, other than the partner suing, becomes in any other way incapable of performing his part of the partnership contract;

(*c*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated prejudicially to affect the carrying on of the business;

(*d*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him;

(*e*) When the business of the partnership can be carried on only at a loss;

(*f*) Whenever circumstances have arisen, which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Corresponding sections, 35 A, 35 E, and 37 C.
This section is identical with the corresponding sections.

Section 37. [Authority of Partners After Dissolution.] (1) The dissolution terminates all authority in any one or more of the partners to act for the firm, except so far as may be necessary to wind up or liquidate the partnership affairs or to complete transactions begun but unfinished at the time of the dissolution, and becomes effective as to any given person only when he receives notice as provided by section 38 of this Act.

(2) Provided the firm is in no case bound by the acts of a partner who has become bankrupt; but this provision does not affect the liability of any person who has after the bankruptcy represented himself or enabled another to represent him as a partner of the bankrupt as declared by section 19 of this Act.

Corresponding provisions, 38 A, 38 E, and 38 (1 and 2) C.
These provisions are identical with section 38 (1 and 2) C and amends 38 A for the reasons set forth under section 38 (1 and 2) C.

(3) Where the partnership agreement does not provide otherwise, a dissolution gives to each partner, not bankrupt, the right to wind up or liquidate the partnership affairs except that any partner dissolving the partnership in contravention of the partnershp agreement shall be entitled only to withdraw his interest in the partnership as provided by section 41 of this Act.

Corresponding provision, 38 (3) C.
This provision follows the corresponding section with slight verbal changes because of the theory. A discussion of the provision appears under section 38 (3) C.

Section 38. [Notice Required on Dissolution.] (1) Where the dissolution is by death or the act of one or more of the partners, the act of any partner, not having actual knowledge or notice of the dissolution, is binding, as to each other, on the partners, not bankrupt or deceased, to the same extent and in the same manner as if the dissolution had not taken place.

Corresponding provision, section 39 C. [See also 36 (5) A, and 36 (3) E.]
This section is identical with section 38 C and is inserted for the reasons there set forth.

(2) After dissolution, third persons by dealings with any partner, not bankrupt, may bind the other partners in the same manner and to the same extent as if the partnership had not been dissolved, except

(*a*) That a deceased, bankrupt or secret and inactive partner shall not be liable as declared under section 18;

(*b*) Where the dissolution has been caused by an event which made it unlawful for the business of the firm to be carried on;

(*c*) When such third person, having had business relations with the firm prior to the dissolution by which a credit was extended upon the faith of the partnership has had actual knowledge or notice of dissolution.

(*d*) When such third person has not had dealings with the firm prior to the dissolution by which a credit was

extended upon the faith of a partnership, and the fact of dissolution has been advertised in a daily newspaper of general circulation of the place (or of each place, if more than one) in which at the time of dissolution the partnership business was regularly or notoriously carried on; or the fact of dissolution is notorious in the community in which such third person is engaged in business.

Corresponding provisions, sections 36 A, and 39 (2) C.
This provision is identical with the corresponding provisions of section 39 C, which amends somewhat section 36 A for the reasons set forth under section 39 C.

(3) Where a person or partnership takes over the property or business of a dissolved partnership and continues the business in such a manner as to represent the continued existence of the dissolved partnership, such person or partnership shall be liable for the existing liabilities of the dissolved partnership to any person who has not had actual knowledge or notice of such change within thirty days after the taking over of the property or business unless such notice is prevented by the fraud of the members of the dissolved partnership.

Corresponding provision, section 39 (3) C.
This provision is identical with the corresponding provision and is introduced into the Act for the reasons there set forth.

(4) Notice under the provisions of this Act, unless the context indicates otherwise, is had where it is in good faith:

(*a*) Actually delivered to the person to be charged with notice;

(*b*) Actually delivered to his agent or at his place of business during business hours; or

(*c*) Actually delivered to a proper person at his residence or last known address; or

(*d*) Properly mailed in a registered letter addressed to his last known address; or

(*e*) Reasonably to be presumed from the knowledge of other facts by the person to be charged with notice.

Corresponding provision, section 38 (4) C.
This provision is identical with the corresponding provision and is inserted into the Act for the reasons there set forth.

Section 39. [Right of Partner to Notify Dissolution.] On the dissolution of a partnership any partner may publicly notify the same, and may require the other partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Corresponding sections, 37 A, 37 E, and 40 C.
This section is identical with section 39 C and amends section 37 A for the reasons set forth under section 40 C.

Section 40. [Discharge of Partner from Liability on Dissolution.] (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the existing partnership creditors and the person or partnership continuing the business, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors, having notice of the dissolution, and the person or partnership continuing the business.

(3) Where the person or partnership continuing the business agrees to assume all the existing liabilities of the dissolved partnership, the partners, not being engaged in continuing the business, with whom the agreement is made shall be merely sureties for the payment of such liabilities as to all persons having actual knowledge or notice of the agreement.

Corresponding sections 16 (2 and 3) A, 16 (2 and 3) E, and 41 C.
This section is identical with section 41 C and amends section 16 (2) A for the reasons set forth under section 41 C.

Section 41. [Rights of Partners to the Application of Partnership Property.] (1) Where the partnership is rightfully dissolved, every partner is entitled, as against the other partners and all persons claiming through them in respect of their interests as partners, to have the partnership property applied to the payment of the debts and liabilities of the partnership, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm, and for that purpose any partner or his representatives may apply to the Court

to wind up the business and affairs of the partnership. Provided, however, that where the dissolution is caused by the expulsion of any partner from the business, as provided by this Act, the expelled partner shall be entitled only to receive what may be due him from the firm if he is discharged from all existing partnership liabilities either by payment thereof or by agreement to that effect as provided in the last foregoing section.

(2) Where the dissolution is in contravention of the agreement as specified in section 35 (2) of this Act, the rights of the partners shall be:

(*a*) Every partner shall be entitled to receive what is due him in respect of his interest in the partnership, subject to any agreement to the contrary, and for that purpose may apply to the Court;

(*b*) The partners, not having wrongfully caused the dissolution, shall be entitled, as against the partner or partners retiring from the business, to continue the business under the firm name at the same place or places with all the rights in any good-will or existing partnership contracts for the period of the agreed term or particular undertaking; and as against the partner or partners wrongfully causing the dissolution, to damages for the breach of the partnership agreement and to a forfeiture of their interests in all such future rights.

(*c*) Where the partner suing has wrongfully dissolved the partnership or has been rightfully expelled from the business, the Court shall not order the affairs of the partnership to be wound up or liquidated unless such partner's interest in the partnership cannot otherwise be determined.

Corresponding sections, 39 A and 39 E, and 42 C.
This section is identical with section 42 C and amends draft A for the reasons set forth under section 42 C.

Section 42. [Rights to Profits Accruing after Dissolution.] (1) Where any person, upon the dissolution of the partnership, has ceased to be associated in the business continued by one or more of his partners or other persons with the capital or assets of the dissolved partnership without any settlement of

accounts as between him or his estate and the person or partnership continuing the business, in the absence of any agreement to the contrary, he is entitled, at the option of himself or his legal representatives, after all other creditors of the partnership, if any, continuing the business have been paid, to the amount of his interest in the assets of the dissolved partnership and such share of the profits made since the dissolution as the Court may find attributable to the use of his share of the assets of the dissolved partnership; or as an ordinary creditor to the amount of his interest in the assets of the dissolved partnership with interest at the legal rate per annum.

(2) Provided that where by the partnership contract an option is given to the surviving or continuing partners to purchase the interest of a deceased or retired partner and that option is duly exercised, the estate of the deceased partner or the retired partner or his estate, as the case may be, is not entitled to any further or other share of the profits; but if any partner assuming to act in the exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Corresponding sections, 42 A, 42 E, and 43 C.
This section is identical with section 43 C and amends section 42 A for the reasons set forth under section 43 C.

Section 43. [Rights where Partnership is Dissolved for Fraud or Misrepresentation.] Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) To a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and

(*b*) To stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c*) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the firm.

Corresponding sections, 41 A & 41 E, and 44 C.
This section is identical with the corresponding sections.

Section 44. [Accrual of Actions.] Subject to any agreement and the provisions of this Act, the right to an account shall accrue to any partner or the legal representatives of any deceased or bankrupt partner in respect of such partner's interest in the partnership at the date of the dissolution; and the amount due in respect of such partner's share is a debt accruing as to any matter covered by an account at the date the account is stated, and as to any matter omitted from the account at the date of notice of liquidation of such matter.

Corresponding sections 43 A, 43 E and 45 C.
This section is identical with 45 C, and amends 43 A for the reasons set forth under 45 C.

Section 45. [Rules for Liquidation.] In settling accounts between the partners after a dissolution of the partnership, the following rules shall be observed subject to any agreement, but such agreement shall not affect the rights of persons other than parties and privies thereto.

(1) The assets of the partnership are:

(*a*) The profits of the business,

(*b*) The partnership property,

(*c*) The contributions of the partners necessary for the payment of all the partnership liabilities.

(2) The liabilities of the partnership shall rank in order of payment as follows:

(*a*) That due to creditors other than partners,

(*b*) That due the partners other than for advances, capital, and profits,

(*c*) That due the partners in respect of advances,

(*d*) That due the partners in respect of capital,

(*e*) That due the partners in respect of profits.

(3) The assets shall be applied to the satisfaction of the foregoing liabilities in the order of their declaration in part one of this section.

(4) The partners shall contribute the whole amount, if any, necessary to satisfy the foregoing liabilities, as provided by section 24 (1) but if one or more but not all the partners are insolvent, or not being subject to process refuse to contribute, the solvent partners subject to process shall contribute the amounts which they would have had to contribute to pay the foregoing liabilities had all the partners contributed; and also equally or ratably, as the case may be, the additional amount, if any, necessary to pay all the foregoing liabilities to third persons.

(5) Where the separate assets of a partner are in possession of the court for distribution, the claims of the firm or the other partners on account of contributions towards the foregoing liabilities and the claims of all firm creditors shall be postponed to the claims of the other creditors of the partner.

(6) Nothing in this section shall be construed to release a liability of a partner as contributor under section 18 of this Act until all the liabilities of the firm to third persons are discharged.

Corresponding sections, 44 A, 44 E, and 46 C.

This section is identical with section 46 C except for slight changes in form due to the theory of this draft, and amends section 43 A for the reasons set forth under section 46 C.

DRAFT C.

A PARTNERSHIP ACT DRAWN ON THE THEORY THAT THE PARTNERSHIP IS AN AGGREGATION OF INDIVIDUALS ASSOCIATED IN BUSINESS.

[Where in the notes to this draft it is stated that there are no corresponding sections or provisions, it is not intended to indicate that there are no corresponding provisions in draft B, but merely that there are no corresponding provisions in draft A or the English Act.]

PART. I.

PRELIMINARY PROVISIONS.

Part I of the present draft corresponds to Part VI of draft A, and the concluding sections of the English Act. It has been transferred from the concluding to the preliminary part of the Act in conformity with the ideas of the modern school of statutory draftsmen. [Cal. C. C. Secs. 2-21; Idaho Rev. Codes, (1909) Secs. 1-20; 1 Code of Ala. (1907) Secs. 1-13; Pub. Stat. of Ver. (1906) Secs. 1-37; Limited Partnership Act, (1907); L. R. 45 Stat. 110 (Eng.); Summary Jurisdiction Act (Scotland) (1908); L. J. R. 88 Stat. 406 (Eng.); Code of Tenn. (1896) 121, 2 S. Dak. Comp. Laws, (1908) 316, 318; Colby's Neb. Stat. (1907) 111.] All the subjects considered in this part of the Act excepting possibly the repeal clause properly belong in a preliminary chapter. Since this Act is intended to comprise all the present law on partnerships, all other acts relating thereto should be repealed, and such a repeal clause properly belongs in a preliminary chapter.

Section 1. [Name of Act.] This Act may be cited for all purposes as the Uniform Partnership Act.

Corresponding sections 63 A and 50 E. [See section 1 B.]
This section is based upon the English Limited Partnership Act, 1907, sec. 1, and Summary Jurisdiction Act, sec. 1. It differs from sec. 63 A in that the words "for all purposes," occurring in the English Acts, are added.

Section 2. [When Act Takes Effect.] This Act shall take effect at twelve o'clock noon on the ..... day of..... one thousand nine hundred and .....

Corresponding sections 62 A and 49 E. [See section 2 B.]
This section is identical except for the words "at twelve o'clock noon," with section 62 A which differs from 49 E in the use of "take effect" instead of "come into operation."

Section 3. [Legislation Repealed.] All acts or parts of acts inconsistent with this Act are hereby repealed. Such acts or parts of acts are specified in Schedule A.

Corresponding sections, 61 A and 48 E. [See section 3 B.]
This section is a combination of the corresponding sections. Provision for a schedule of the repealed acts is added for use in the States where such specific mention may be necessary. The location of this section in the preliminary chapter has support of authority. [Idaho Rev. Codes (*supra*) secs. 17-19; Summary Jurisdiction Act (*supra*) sec. 3; 1 Ala. Code 1907, sec. 10; Cal. Civ. C. sec. 20.]

Section 4. [Definition of Terms.] In this Act, unless the context is repugnant to such construction,—

"Court" includes every Court and Judge having jurisdiction of the cause.

"Business" includes every trade, occupation or profession.

"Person" includes natural or corporate persons, partnerships and other associations.

"Bankrupt" includes every person declared bankrupt under the Federal Bankrupt Act or insolvent under any State Insolvent Act.

"Partner" or "general partner" includes any partner who is not a special partner as defined by this Act.

Corresponding sections, 56 A and 45 E. [See section 4 B.]
This section amends section 56 A by the use of the words "unless the context is repugnant to such construction" instead of "unless the contrary intention appears." [1 Idaho Rev. Codes (1908), sec. 16; Cal. C. C. sec. 14; Limited Partnership Act, 1907, (Eng.) sec. 3.] The definition of "person" is added for extra caution and to prevent repetitions in the Act.
Under the English law Bankruptcy is controlled by one Act only. Here the Federal law is paramount but state laws at times, or under special circumstances, may apply. "Bankrupt" is defined to cover these contingencies. [Beale's Parsons, sec. 366-369.]

Section 5. [Rules of Construction.] (1) The rule of the Common law, that statutes in derogation thereof are to be construed strictly, has no application to this Act.

No corresponding provision. [See section 5 (1) B.]
This provision is customary in American Codes. [Cal. C. C. sec. 4; 1 Ala. Code (1907) Sec. 12; 1 Idaho Rev. Codes, Sec. 4.]

(2) The provisions of this Act shall be so interpreted and construed as to effect its general purpose to make uniform the

law of those States which enact it and to promote justice; and a substantial compliance with its provisions shall not render a special partner liable as a general partner.

Corresponding section, 59 A. [See section 5 (2) B.]
The alterations in this provision are based on the American Codes. [Idaho Rev. Codes, Sec. 4; Cal. C. C. Sec. 4; Rev. Stat. of Colo. (1908) Sec. 467, 468; Gen. Stat. of Kans. (1905), 1633; 1 Burns Anno. Ind. Stat. (1908); Secs. 240, 241, 1356, 1359; Colby's Rev. Stat. Neb. 111, 363; 2 S. Dak. Comp. Laws (1908) 313, 316, 318.]

(3) The provisions of this Act shall not be construed so as to impair the obligations of any contract existing when the Act goes into effect nor to affect any action or proceedings begun or right accrued before this Act takes effect.

Corresponding section 60 A. [See section 5 (3) B.]
This section rejects the corresponding section because the Act should apply to all partnerships in so far as it may constitutionally so do. To this end the saving clause is inserted. This is the general procedure in the Codes. [See Citations, paragraph (2) *supra.*]

Section 6. [Rules for Cases not Provided for in this Act.] In any case not provided for in this Act, the rules of common law and equity, including the law merchant, shall govern.

Corresponding sections, 57 A and 46 E. [See section (6) B.]
This section is identical with section 57 A except that "rules of common law" of sec. 46 E, is employed instead of "rules of law" of section 57 A.

PART II.

NATURE OF A PARTNERSHIP.

The arrangement of this section follows the order of that of draft A, Part I, the corresponding section of that draft. Section 3 A has been omitted from the present draft. It has nothing to do with the theory of the drafts but is omitted because it is foreign to the general American law, except in Pennsylvania where it has been adopted in a modified form, only to cause confusion. [Act of April 6, 1870, P. L. 56; *Wessels* v. *Weiss,* 166 Pa. 490 (1895); *Jordan* v. *Patrick,* 207 Pa. 245 (1903); *Waverly* v. *Hall,* 150 Pa. 466 (1892); *Hart* v. *Kelley,* 83 Pa. 286 (1877); *Edwards* v. *Tracy,* 62 Pa. 374 (1869); *Walker* v. *Tupper,* 152 Pa. 1 (1892); *Gibb's Estate,* 157 Pa. 59 (1893)]; and in Georgia where sharing the profits creates a partnership. [*Buckner* v. *Lee,* 8 Ga. 285 (1850); *Perry* v. *Butt,* 14 Ga. 699 (1854); *Dalton* v. *Dalton,* 33 Ga. 243 (1862); *Dalton* v. *Hawes,* 37 Ga. 115 (1867); *Huguley* v. *Morris,* 65 Ga. 666 (1880); *Brandon* v. *Conner,* 117 Ga. 759 (1903).] In all other jurisdictions sharing profits is not a conclusive test

of partnership and where persons are not partners a mere debtor and creditor relation arises. The claims of such persons are not postponed and any mortgage or other security which they may have taken is valid as in other cases. [See Note in 18 L. R. A. 963, 1055 (1908).]

Aside from the fact that section 3 A differs from the present law, there are two objections to its present insertion. Where the loan is to a partnership, then it may be proper to postpone such lender to all the other creditors of the firm; but where the loan is to a sole-trader, under 3 A such lender would be postponed, not only to all the other creditors of that particular business, but also to all other creditors of such person. It thus would happen that where the loan is made to a sole-trader, the lender could recover nothing in respect of his loan so long as there were any other outstanding claims against his debtor. Section 3 A would therefore, if adopted, destroy the value of such loans. This result could be avoided by taking a mortgage or other security but for the clause in 3 A against such mortgages. The second objection is that it is possible that invalidating mortgages given for such loans might throw a doubt on the value of other mortgages. The purchaser of a mortgage would at least have to demand positive proof that it was not given to secure a loan, where profits of a business were to be paid in lieu of interest.

Section 5 A, on Registration, has been omitted from this draft because it is believed that there are valid objections to any such requirement, especially where the theory does not demand such registration. [Pollock's Essays in Jurisprudence and Ethics, 107.] Such registration could not be strictly enforced, and would eliminate the secret and dormant partner which does not appear to be the purpose of this Act. It demands that all partners should register even though they may not know that they have created a partnership. No effective and at the same time desirable method of enforcement has been produced.

In other respects the order and arrangement of draft A has been maintained in this Part of the present draft.

Section 7. [Partnership Defined.] (1) A partnership is an association of two or more individuals for the purpose of carrying on, as co-owners, a business with a view to profit.

Corresponding provisions, sections 1 (1) A and 1 (1) E. [See section 7 (1) B.]

This section agrees with the substance of section 1 E and rejects that of section 1 A because of the theory of this draft.

Under the definition of this paragraph, the customary term of mercantile law "association" is employed instead of "the relation which subsists between persons" as employed by section 1 E. The nature of the relation, or the bond of union, of the associates is that they are "co-owners" of the business. The subject matter of the co-ownership is limited by the declaration that it is the co-ownership of the business as a whole and not necessarily of any specific chattel or real property, for all such property may be owned by any one of the partners. Business has a recognized meaning in the mercantile world and when the business is defined as one carried on with a view to profit, it is separated from those engaged in charity. Whether they are co-owners of the business or not is a question of fact and must be found as such. The rules set forth in the next section are provided for the ascertainment of this fact.

If it is said that partnership is the "relation which subsists between the persons carrying on a business in common," the use of the phrase "in common"

immediately suggests "tenants in common"; but the legal incidents of "tenants in common" are not the legal incidents of this relation. There is no analogy between the two to necessitate the use of this phrase. If partnership is considered merely as a relation then such relation must be differentiated from all other relations; this is generally done by describing it as a "partnership relation" which violates the canons of logic.

(2) But any association formed under the provision of any other statute is not a partnership under the provisions of this Act unless so declared by that statute.

Corresponding sections, 1 (2) A and 1 (2) E. [See section 7 (2) B.]

The corresponding section of the English Act excepts associations formed by charters or other statutes but not such as are specified by section 1 (2) A. If the wording of 1 (2) A is followed associations formed, not under any statute, may fall without this Act, while certain associations of Pennsylvania and other states formed under other statutes, as associations formed under the Registered Partnership Act of the State of Pennsylvania, would be improperly included within the Act. [Bates Limited Partnership § 208.]

Again if all the business associations which are not partnerships are to be enumerated in paragraph (2) of this section, the paragraph will have to be differently worded for each state, and any new statute providing for the organization of a new business association would have to contain a special clause to the effect that the associations formed under it were not subject to the "Uniform Partnership Act." Under the wording of the present draft, if the association falls within the definition of the first paragraph of the section, and is not organized under another statute, then it is a partnership and subject to the provisions of this Act.

Section 8. [Rules for Determining the Existence of a Partnership.] In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Except as expressly provided by section 18 of this Act, persons who are not partners as to each other are not partners as to third persons.

Corresponding section 2 (1) A. [See section 8 (1) B.]

This paragraph makes a slight verbal change upon the corresponding paragraph in that "In the absence of an estoppel by misrepresentation (provided for in section 13 of this Act)" is altered to read "Except as expressly provided by section 18 of this Act."

(2) Persons are partners as to each other when by agreement, express or implied as a fact, all the parties have a right to take part in the conduct and management of the business to the exclusion of persons not parties to the agreement and to compel the application of the property employed in the business to the payment of all liabilities arising out of the business.

No corresponding provision. [See section 8 (2) B.]

This paragraph is an attempt to declare certain facts upon the discovery of which it may definitely be said that a partnership exists. While it may be said that these are incidents resulting from partnership rather than incidents creating a partnership, this is not necessarily correct; for persons may contract for these rights without intending any partnership. Just as a physician by investigating the resulting incidents of a disease discovers the disease, so also the discovery of the incidents of a partnership is the discovery of a partnership. This rule, however, is not complete for by the agreement a partnership may exist yet the incidents mentiond in this paragraph may be waived. These incidents, however, are not the incidents of any other association, unless the association is formed under a special statute, which associations are excluded under section 7 (2) *supra.*

(3) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(4) The sharing of gross returns does not of itself create a partnership, whether the person sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

Corresponding provisions 2 (2 and 3) A, and 2 (1 and 2) E. [See section 8 (3 and 4) B.]

These provisions are identical with the corresponding provisions.

(5) The receipt by a person of a share of the profits of a business or of a payment contingent on or varying with the profits of a business raises a presumption of the existence of a partnership to be rebutted by other evidence; but:

Corresponding provision, section 2 (4) A and 2 (3) E. [See section 8 (5) B.]

The corresponding provision of the English Act has been criticised for the use of the phrase "prima facie" (Pollock, 18). The provision of 2 (4) A avoids this phrase, but in such a manner as to alter the present law. Under the English Act, proof of sharing profits is "prima facie evidence" of the existence of a partnership [Lindley, 43]. If no other evidence is presented, the plaintiff has made out his case, but if the defendant offers other evidence, then sharing profits is merely a matter of evidence to be considered as all other evidence. Such is also the American law. [Bates, section 25 *et seq.;* Burdick, 49; 30 Cyc. 369, 371; Mechem, sections 46-53.] Under 2 (4) A the plaintiff does not make out a sufficient case by proving that persons shared the profits; but he must offer additional evidence. If he does not offer additional evidence, the defendant need not offer any evidence to show in what capacity the profits are shared. This places a burden upon the plaintiff which he does not have under the English Act or the present American law.

(*a*) The receipt by a person of a debt or other liquidated amount by installments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(*b*) A contract for the remuneration of an employee or agent or landlord of a person engaged in a business by a share of the profits of the business does not of itself make the employee or agent or landlord a partner in the business or liable as such;

(*c*) A person being the legal representative, widow, or legatee of a deceased partner, and having by way of annuity or otherwise a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such;

(*d*) The advance of money by way of loan to a person or partnership engaged or about to engage in any business on a contract with that person or partnership that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or in the partnership carrying on the business or liable as such;

Corresponding sections 2 (4a, b, c, d) A and 2 (3a, b, c, d) E. [See section 8 (5a, b, c, d) B.]

These provisions are identical with the corresponding provisions.

(*e*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the good-will of a business or other property is not by reason only of such receipt a partner in the business or liable as such.

Corresponding sections 2 (4c) A and 2 (3e) E. [See section 8 (5e) B.]

This provision is identical with the corresponding provisions except that "or other property" is included. If a sale of a good-will in consideration of a share of profits does not create a partnership, then the sale of other property in the same manner should not do so. This is the present law. [18 L. R. A. (note), 1041 (1908).]

Section 9. [The Firm, its Name and Property.] (1) Persons who have entered into partnership with one another are for the purpose of this Act called collectively a firm and the name under which their business is carried on is called the firm name.

Corresponding sections 4 (1) A and 4 (1) E. [See section 9 B.]
Despite the difference in the underlying theories of this and the corresponding sections, the wording is identical. This wording is proper under the theory of the English Act and of this draft, but repudiates the theory of draft A as declared in section 1 of that draft. For the reasons set forth in note 1, [Notes on the Preliminary Study of Draft A, *supra*, p. 4.] and the note to section 9 B, the wording of the English section is retained in this section.

(2) It shall be unlawful to use in the firm name any general term which does not represent an actual partner or the name of any person not actually a partner unless (*a*) such person or his legal representative has consented thereto, or (*b*) such name is also the name of one of the partners so using it. Every partner using such firm name commits a misdemeanor and shall be liable to imprisonment for a term not exceeding two years.

No corresponding section. [See section 9 (2) B.]
This paragraph is adopted from the laws of New York, Georgia and Louisiana. [N. Y. Penal Code, Sec. 363; Ga. Civil Code (1897), Sec. 2636; Saunder's Rev. Civ. Code of La., Sec. 2838.] It is intended to prevent the fraudulent use of a general term or the name of another for the purpose of inducing a false credit. [*Wolfe* v. *Joubert*, 45 La. Ann. 1100 (1893); *Marino* v. *Lehmaier*, 173 N. Y. 546 (1903); *Gay* v. *Seibold*, 97 N. Y. 472, 476 (1884).] It is submitted that this provision is aimed at a real evil. Under the present law, except a bill in equity which may be brought by the person held out as a partner, the remedies both civil and criminal do not accrue until damage has been done; and then the remedy provided may have no real value as to the person damaged. The penalty is that of the English Limited Partnership Act, 1907, section 12.

(3) All property and rights and interests in property originally brought into the partnership stock or subsequently acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business are called in this Act partnership property. Unless the contrary intention appears, property acquired with partnership funds is deemed to be patnership property.

Corresponding sections 20 and 21 A, and 20 and 21 E. [See section 9 (3) B.]

This paragraph is the incorporation of the corresponding sections into the forepart of the Act in accordance with the arrangement of our codes [Cal. C. Code, Sec. 2401, Saunder's Rev. C. C. of La., Sec. 2808], because of the fact that third persons are concerned as to what is partnership property. The wording of this paragraph is identical with 20 and 21 E in so far as they define partnership property. The two sections are combined for simplification. [*Robinson Bank* v. *Miller,* 27 L. R. A. (note), 449 (1894).]

(4) The partnership may take and hold in fee simple or for any less estate, real estate or interests therein, in the firm name, and the same shall be as valid and effectual in law and equity as if the same were in the individual names of all the partners. Where the title is so taken in the firm name, it can be mortgaged, encumbered, leased, or conveyed in the firm name only, and authority so to act shall exist in every partner as declared in Part III of this Act.

No corresponding provisions.

This provision is based upon the Pennsylvania statute regulating Registered Partnerships [Act May 9, 1899, P. L. 261, Sec. 9]. Its purpose is to do away with the present confusion as to the holding of real estate and the effect of a deed of conveyance in the firm name. Partners under this draft would own in common partnership property [see section 30, *infra*]. The paragraph as drawn does not do away with present methods of conveyancing. It merely provides for an additional, and it is submitted, convenient method of obtaining title to real property which is to be used for firm purposes, and conveying such property when so obtained; the method may or may not be used at the option of the partners. The partners would be the grantors though one partner might sign the firm name to the deed without the knowledge of his co-partners. The partner so signing the firm name to the deed would act as the agent of his copartners.

Whether one partner possesses authority to execute the deed of conveyance is governed by Part III [*infra*] and depends upon the ordinary course of business. Thus, where the firm is engaged in the dry-goods business and holds real property in the firm name, one partner does not have authority to execute the deed unless he is specially authorized. This question of authority is one of fact and depends upon the nature of the business.

Should a partner convey land in the firm name, but beyond his power as a partner, the legal title would, nevertheless, be in the grantee, subject, however, to be revested in the partners by proper equitable proceedings, unless the title had passed to a holder for value without notice.

PART III.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP.

The caption of Part II A, the corresponding part of that draft, reads, "Relations of Partners to Persons Dealing with them as Such." This caption would include sub-partners which are not considered. Dealing with the partnership is the essential element, therefore the caption has been altered accordingly.

In the arrangement of the sections, draft A follows the arrangement of the English Act. The reason for the arrangement there adopted does not appear. The arrangement adopted in the present draft is the result of a desire to treat first the different acts which bind the firm; then the liability resulting from those acts and the enforcement of such liability; fraudulent conveyances and guaranties, not belonging to either of those groups, are considered in the concluding sections.

Sections 7A and 6E are omitted. They define in part the acts of agents or partners binding on the firm. In so far as these sections deal with agents not partners, the provisions have no place in a Partnership Act; in so far as they deal with partners, they are unnecessary. 7 A was not in the prior drafts submitted by Mr. Ames.

So much of section 16A as relates to a retiring partner is transferred to Part V, *infra*, which treats of dissolution and its results, because under the present draft, the retirement of any partner produces dissolution.

Section 10. [Partner Agent of the Firm as to Partnership Business.] Every partner is an agent of the firm for the purpose of the business of the partnership; and the acts of every partner who does any act, including the execution in the firm name of deeds of obligation or conveyance, for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing has actual knowledge or notice of the fact that he has no authority.

Corresponding sections 6 A and 5 E. [See section 11 B.]

This section is intended merely to declare the common law on the subject. It differs in substance from section 6A and 5E in the omission of the final words, "or does not know or believe him to be a partner." These words are based upon dicta in the cases of *Nicholson* v. *Ricketts,* 2 E. & E. 524 (1860), and *Holme* v. *Hammond,* L. R. 7 Ex. 233 (1872), which criticises the prior case of *South Carolina Bank* v. *Case,* 8 B. & C. 427 (1828). Lord Justice Lindley [Partnerships (7th Ed.), 145] approves these words, but Sir Frederick Pollock [Partnerships (7th Ed.), 28] appears to cast some doubt upon them on account of the case of *Witteau* v. *Fenwick* [(1893), 1 Q. B. 346], a case of principal and agent.

No case has been found in America which gives support to the words "or

does not know or believe him to be a partner," and none of the text-books refer to such principle. [*Baxter* v. *Clark,* 4 Ired. (N. C.) 127 (1813); *Everett* v. *Chapman,* 6 Conn. 347 (1827); *Reynolds* v. *Cleveland,* 4 Cow. (N. Y.) 282 (1825), (*semble*); *Livingston* v. *Roosevelt,* 4 Johns. 251 (1809), *semble; Holmes* v. *Burton,* 9 Vt. 255 (1837); *Tucker* v. *Peaslee,* 36 N. H. 167 (1858), (*semble*); *Bank* v. *Hennessey* 48 N. Y 550 (1872); *National Bank* v. *Carrigan,* 91 Va. 347, 357, 358 (1892); *Jones* v. *Hoadley,* 115 N. Y. App. D. 487 (1906); *Sinkler* v. *Lambert,* 5 Phila. (Pa.) 36, 40 (1862); *Winship* v. *Bank,* 5 Pet. 529, 555, 560 (1831); Bates on Partnership (1888), Secs. 322, 323; James Parsons, Sec. 138; Beale's Parsons, Sec. 84; 30 Cyc. 479.] In these cases the liability of the partnership turned entirely upon the fact that the plaintiff did not know that he was dealing with a partner. The words quoted are broad enough to cover any partner, whether secret, active, or dormant, who acts in an undisclosed capacity, as well as the case where the partnership itself is an entirely secret relation. In every such case the partners could escape liability by setting up that the partner acting had no authority to bind the firm in the particular matter. Practically, therefore, ratification would be necessary to bind in contract or receipt of the benefit to bind in quasi contract. That a partnership contract was intended by the acting partner would not be of itself sufficient. Such a result places a greater burden than at present on the third person and promotes acting in an undisclosed capacity. If a partner desires to commit a fraud upon his co-partners, these words will not prevent him; for by disclosing the fact that he is a partner he possesses the full authority of a partner and can bind the firm within his apparent authority and in a contract only apparently intended for the firm. It is submitted that a partner is liable for the acts of his co-partners because he is an owner of the business. Whether he is held out as owner or not is immaterial. An attempted restriction on the ordinary authority of a partner to act within the general scope of the business, should be as ineffective in the case of an undisclosed partnership, as in the case of where the disclosed principal is not a partnership.

The words "and his other partners" of 5 E are omitted. Under section 9, *supra,* the "firm" means the partners collectively. The words omitted might denote that each partner was bound severally, which is not so; see 17 (2), *infra.*

The expression, "has actual knowledge or notice," is employed in the last clause instead of the words "knows that he has no authority," employed in sections 6 A and 5 E. The term "notice" is defined in section 39, *infra.*

Section 11. [Firm Not Bound by Acts of Partner without the Scope of the Partnership Business.] (1) Where one partner pledges the credit of the firm for a purpose not connected with the ordinary course of business of the kind carried on by the firm, the firm is not bound unless he is in fact specially authorized by the other partners or unless such an act is necessarily done for the preservation of the business or property of the firm; but this section does not affect any personal liability incurred by any individual partner.

Corresponding sections 8A and 7E. [See section 12 (1) B.]

The doctrine of estoppel, incorporated in section 8A in accordance with a criticism of section 7E [Pollock (7th Ed.), 36], is omitted from this section. This doctrine is a general doctrine in the law which may come into application

at any time during a trial. Its application in this section is the same as may exist without declaration in numerous other sections of the Act. The enumeration of its application here indicates that it should not apply to the other section unless mentioned. Since this should not be the case, it is omitted here also.

By section 25, *infra* (also 24A), a partner must be indemnified in respect of payments made and personal liabilities incurred by him in or about anything necessarily done for the preservation of the business or property of the firm. This section makes this liability of the firm a liability direct to the third person, so as to avoid circuity of action.

Section 8A employs "Not connected with the ordinary course of business of the kind carried on by the firm," instead of "apparently not connected with the firm's ordinary course of business" of section 7E. The wording of section 8A, also employed in section 6A and 5E, is retained in this section. The word "apparent" is a common term in the law, but of rather uncertain meaning. The wording of sections 6A, 8A, 5E and this section is new in the law; but should not result in confusion [Lindley, 147], though it may tend to cause persons dealing with the firm to consider other known "businesses of the kind" rather than the apparent scope of that particular business. [30 Cyc. 477; Beale's Parsons, Sec. 115; James Parsons (1899), Sec. 182, 599; Burdick, 166; *Winship* v. *Bank*, 5 Pet. (U. S.) 529 (1831); *Rice* v. *Jackson*, 171 Pa. 89 (1895); *Stimson* v. *Whitney*, 130 Mass. 591 (1881); Wood's Collyer, Secs. 414, 415.]

(2) In particular, a partner has not authority to do any of the following acts unless his co-partners have wholly abandoned the business to him or are incapable of acting:

(*a*) To make an assignment of the partnership property or any portion thereof to a creditor or to a third person in trust for the benefit of a creditor or of all the creditors.

(*b*) To dispose of the good-will of the business.

(*c*) To dispose of the whole of the partnership property at once, unless it consists entirely of merchandise.

(*d*) To do any act which would make it impossible to carry on the ordinary business of the partnership.

(*e*) To confess a judgment.

(*f*) To submit a partnership claim to arbitration.

No corresponding provision. [See section 12 (2) B.]

This provision declares specific acts which, in the absence of agreement or consent of all the partners, are without the ordinary course of the business and the authority of any one of the partners. This enumeration is taken from the California Civil Code, section 2430, which has been copied generally into the codes of the other Western States. These prohibitions appear to be such as apply generally. Since such acts are generally without the scope of a partner's authority, the enumeration in the Act is, it is submitted, advisable as a proper notice to partners and third persons.

Section 12. [Restrictions upon Authority of a Partner.] If it has been agreed between the partners that any restrictions shall

be placed on the authority of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having actual knowledge or notice that the act is in contravention of the agreement.

Corresponding sections 9A and 8E. [See section 13B.]
"Secret" in the caption of section 9A is omitted because only known restrictions are effective and both known and secret restrictions are covered by the section.
The word "authority" is substituted for the word "power" as used by sections 9A and 8E, because the restriction is placed upon the authority and affects the power only if it becomes known.
"Having actual knowledge or notice" is employed instead of "notice" throughout this draft. Notice is defined in section 39 (4), *infra.*

Section 13. [Firm Bound by Admission of Partner.] An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Act is evidence against the firm.

Corresponding sections 14A and 15E. [See section 14B.]
This section is intended to declare the present law. It differs from the corresponding sections in that it requires that the admission must be made within the scope of the partner's authority as declared by the other sections of the Act. Such is the law applicable to admissions by agents. [Mechem on Agency, Sec. 714.] The same rules should apply to partners. Admissions before dissolution concerning a particular matter should bind the firm only where the partner has authority to act in the particular matter; and after dissolution only if necessary to wind up the business. Where the partner has no authority to act and the person with whom he is dealing knows he has no authority, or where the admission is not for the winding up of the affairs, it should not bind the firm. If it is not the act of the firm, then it should not be evidence against them.
The rule adopted by the present section is, as stated, the ordinary rule of agency. It is supported by Prof. Burdick [30 Cyc. 522; Partnerships, 186, 233] and others. [Story, Sec. 107; Lindley, 148.] The contrary rule appears to be supported by Mechem on Partnership, Sec. 169; Beale's Parsons, Sec. 126; Bates, Secs. 331-333.]
"That the act is in contravention of the agreement" is employed instead of "of the agreement" because knowledge or notice of the agreement is not necessarily knowledge or notice that the act is in contravention of it. The intention is to avoid this confusion in the law of agency on this subject. (Mechem on Agency, sec. 717 and cases cited.)

ter implied from his knowledge acquired as a partner or then present to his mind operate as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

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Corresponding sections 15A and 16E. [See section 15B.]
This section amends the corresponding sections. The amendment is due

to the numerous meanings of notice and to the fact that only actual notice to any partner is necessarily notice to all. [Mechem on Partnership, Sec. 184; Mechem on Agency, Sec. 718-731.] Where the notice is implied merely from knowledge, then only the partner acting in the particular matter is to be considered. [*Williamson* v. *Barbour,* 9 Ch. D. 529, 535 (1877); *Lacey* v. *Hill,* 4 Ch. D. 549 (1876); *Baldwin* v. *Leonard,* 39 Vt. 260 (1867); *Bienenstok* v. *Ammidown,* 155 N. Y. 47 (1898); Bates on Partnership (1888), Secs. 389-401.] Nor is the knowledge of the partner acting in the particular matter notice to the firm unless such knowledge was acquired in the capacity of a partner or was then present to his mind. [Lindley, 151; Bates (1888), Secs. 391, 394.] The section has been drafted with the intention of differentiating these cases and following the general principles of agency and not with the intention of declaring anything new. [30 Cyc. 530, 531; *Flynn* v. *Bank,* 118 S. W. (Tex.) 848 (1909).]

Section 15. [Firm Bound by Partner's Wrongful Act or Omission within the scope of his Authority as Conferred by this Act.] Where by any wrongful act or omission of any partner acting in the ordinary course of the partnership business or with the authority of his co-partners loss or injury is caused to any person not being a partner in the firm or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Corresponding sections 10A and 10E. [See section 16B.]
This section is identical with the corresponding sections except that the caption is changed to accord with the section.

Section 16. [Firm Bound by Partner's Breach of Trust.] In the following cases, namely:

(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b*) Where the firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

Corresponding sections 11A and 11E. [See section 17B.]
This section is identical with the corresponding sections except that the caption is made uniform with those of the other sections of this draft.

Section 17. [Nature of Partner's Liability.] (1) For everything for which the firm, while he is a partner therein,

becomes liable under either of the two last preceding sections, each partner is liable jointly with his co-partners and also severally.

Corresponding section 12E and 12A. [See section 18B.]

This action declares the present liability of the partners for torts, making that liability both joint and several as declared in 12E instead of merely joint as under sections 10A, 11A and 12A. All the authorities hold tort liability to be joint and several. [30 Cyc. 535; Beale's Parsons, Sec. 100 *et seq.;* Burdick, 191-215, 252; Story, Secs 166, 167; Notes in 41 L. R. A. 650; 51 L. R. A. 463; Wood's Collyer, Sec. 446 *et seq.;* Lindley, 228.]

(2) For all debts and obligations of the partnership, each partner is liable jointly with his co-partners; but such liability may be limited to his interest in the partnership as provided by this Act.

Corresponding sections 12 A and 9 E. [See section 18 B.]

This section declares the present law of contract liability, [30 Cyc. 533; Lindley, 221 *et seq.;* Bates, Secs. 454, 457; Wood's Collyer, Sec. 405, *et seq.,*] following section 9 E, but rejecting Sec. 12 A, which is an attempt to carry out the theory of that draft. [See draft B, section 18.] The method of enforcing this contractual liability is set forth in section 21, *infra.* The limitations of liability provided for by the last clause are those provided in sections 19, 20 and 38, *infra.*

Section 18. [Liability as a Partner by Estoppel.] (1) When a person by words spoken or written or by conduct represents himself or consents to another representing him as a partner in an existing firm, or in a particular business with one or more persons not actual partners, he is liable jointly with the members of the firm or with the persons represented as partners to the same extent and in the same manner as though he were an actual partner of such person or persons to any person who relies upon the representation. Any or all future liability arising under this provision may be avoided by giving notice as provided by section 20.

Corresponding sections 13 A and 14 E. [See section 19 (1) B.]

The English Act and draft A would appear to be defective in that many questions in relation to the rights and liabilities of a person held out as a partner and third persons are not definitely treated. In the present draft, the attempt has been made to cover these rights and liabilities.

This part of the section is intended to declare the present law. The words "knowingly suffers" of the corresponding sections have been held to make a person liable if he has been held out as a partner and knows that he is being held out, unless he prevents such holding out by legal means if

necessary. [*Walter* v. *Ashton,* (1902) 2 Ch. 294; Lindley (7th Ed.) 72.] There is American authority supporting this view. [*Fletcher* v. *Pullen,* 70 Md. 205 (1889); *Janner* v. *Hall,* 86 Ala. 305, (1888); *Rittenhouse* v. *Leigh,* 57 Miss. 697 (1880); *Speer* v. *Bishop,* 24 Ohio St. 598 (1874); Prof. Burdick in 30 Cyc. 393.] Such was not the common law of England, [*Newsome* v. *Coles,* 2 Camp. 617 (1811); *ex parte* Central Bank, (1892) 2 Q. B. 633; *Burchell* v. *Wilde,* (1900) 1 Ch. 563.] This earlier English law is in harmony with the general principles of estoppel and appears to be supported by the better legal and business reasoning. Mere knowledge of a representation made by another does not raise a duty to speak unless it is made in the presence of the party to be affected who stands silently by. To require that if he knows he is being held out, he must prevent the holding out or the reliance, even where the holding out was not due to any act or consent of his, is carrying the matter too far. To bring the law into harmony with this view and the more satisfactory cases, this draft requires the person to represent himself or "enable" another to do so. [*Morgan* v. *Farrel,* 58 Conn. 413 (1890); *Bishop* v. *Georgeson,* 60 Ill. 484 (1871); *Thompson* v. *Bank,* 111 U. S. 529 (1883); *Fisher* v. *McDonald,* 85 Ill. App. 653 (1899); *Ihmsen* v. *Lathrop,* 104 Pa. 365 (1883); Wood's Collyer, 75 N.]

To avoid the consequences of *Scarf* v. *Jardine,* 7 App. Cas. 345 (1882) it is declared that he is jointly liable with the members of the firm or the persons represented to be partners.

To enable such person to exonerate himself from future liability to the same extent and in the same manner as an actual partner, the application of section 20 is declared. This section and the other parts of this draft of the Act referring to the rights and liabilities of a person held out as a partner are based upon what, it is submitted, is a necessary assumption, that such person, not being a partner in fact, is not within the provisions of this Act except in so far as it is expressly so declared. In this respect the present draft differs from draft A.

(2) When a person has been thus represented to be a partner in an existing partnership or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is merely the joint act or obligation of the person acting and the persons consenting to the representation.

No corresponding sections. [See section 19 (2) B.]

This part of the section is intended to declare the agency of the person held out as it exists in the present law in accord with the principles of estoppel. [30 Cyc. 395; Jas. Parsons, Sec. 69.]

Where there is an existing partnership each partner must for himself consent to the holding out of a person not an actual partner. Where they all consent the status is the same as if a new partner, making no contribution to the partnership property, had been admitted into the firm, or that which would not have been a partnership act has been made such by the consent

of all. In such case the partnership property is subject to the liability. But when no partnership in fact exists or when all the partners do not consent so as to create a partnership transaction, there is either no partnership property; or, if there is any, it is not subject to the liability. In this manner the confusing questions as to the rights of firm and separate creditors are avoided, and the results of the cases of *Thayer* v. *Humphreys* [91 Wis. 276 (1895)], criticised by Prof. Burdick [Partnerships (1899) 60, 278], and of *Broadway Bank* v. *Wood,* [165 Mass. 312 (1896)], are avoided.

(3) Where all the members of an existing partnership consent to the representation, the person represented to be a partner is entitled as though he were a partner, subject to any agreement, to have the partnership property, if there is any, applied in payment of any liability incurred by him because of the representation, and for that purpose he may apply to the court to wind up the business and affairs of the partnership if necessary.

No corresponding sections. [See section 19 (3) B.]

This part of the section grants to the person held out as a partner the rights of a partner in partnership property where there is in fact a firm and all the partners consent to the holding out.

(4) The continuation of the partnership business in the old firm name with or without the consent of the representatives of a deceased partner, does not of itself make the estate or effects of the deceased partner or his executor or administrator liable for any partnership debt contracted after the partner's death.

Corresponding sections 13 A (2) and 14 E (2). [See section 19 (4) B.]

This section declares the present law [30 Cyc. 638]. Death terminates the agency and liability for future transactions as to the deceased partner. No notice is necessary to affect this result as to his estate. By agreement part or all of his estate may become liable; but the mere fact that his name continues in use, or that part of his estate is continued in the business, does not make the remainder of his estate or that of his executor or administrator liable.

Section 19. [Liability of an Incoming Partner.] A person who is admitted as a partner into an existing partnership becomes liable as a partner for all existing liabilities of such partnership as though he were a partner when the liability was incurred, except that this liability shall be limited to his interest in the partnership property.

Corresponding sections 16 A and 17 E. [See section 20 B.]

This section is an innovation upon the existing law intended to do away with the present confusion as to creditors' rights caused by the admission

of a new partner. Beale's Parson's (p. 399) says any change in the membership of the firm causes a dissolution. With this Wood's Collyer (151n) agrees. Story (Sec. 152); Jas. Parsons (Sec. 148); and Prof. Burdick (30 Cyc. 603-619) appear to hold otherwise, but do not definitely state whether the firm is dissolved upon either the admission or retirement of any partner.

Under the present draft, a dissolution results from specific defined causes and produces defined results. The admission of a new partner does not cause a dissolution. Since the results of the admission of a partner are entirely different from those caused by retirement, each is treated separately. Since the firm may be sued in the firm name, the admission of a new partner should not change this result. That which was partnership property subject to the debt should not cease to be so upon the admission of a new partner. No necessity for settling up the affairs of the firm arises because the interest of each partner continues.

There is no change in agency, business, or property requiring that the partnership should cease to exist; and business expediency would frequently make it undesirable to form a new firm. Creditors have no means of ascertaining any change in the firm or the transfer of the partnership property from an old to a new firm. The rights of the existing creditors should be co-extensive with those of the subsequent creditors as to partnership property. Since the incoming partner receives the benefits of the existing business and property, he should take them with the attending liabilities, at least to the extent of the property which he has invested in the business.

Sections 16 A and 17 E expressly state that an incoming partner is not liable for liabilities of the firm existing at the time of his admission. Draft A and the English Act, however, are, it is submitted, seriously defective in that they do not make clear just what the rights of the existing and subsequent firm creditors are after the admission of a new partner. The present section is intended to remedy this defect by preserving the rights of existing creditors against the partnership property, at least where no partner retires.

Section 20. [Exoneration from Future Liability.] (1) A partner may limit his liability as to any particular contract or transaction with any third person to his interest in the partnership property by giving notice to such third person, before liability is incurred, that he assumes no liability as to such contract or transaction.

No corresponding sections. [See section 21 (1) B.]

An express dissent by a partner who does not approve of the proposed transaction, but does not wish to dissolve the firm, would be as effective as to third persons where there are more than two partners as where there are only two partners. [Mechem on Partnerships, 163, 189. Burdick, 220. Beale's Parsons, Sec. 84.]

(2) A partner may exonerate himself from all liability to third persons or to his co-partners on account of any future contract or transaction by giving notice, as provided by this Act, to third persons and to his partners that he dissolves the partnership.

Corresponding section 18 A. [See section 21 (2) B.]

Considerable confusion exists in the law upon the subject treated. This paragraph as written appears to have the support of the weight of authority. [Cal. Civ. Code, Sec. 2417; S. Dak. C. Code, Sec. 1736; Okla. C. C., Sec. 4850; N. Dak. C. C., Sec. 5848; Mont. C. C., Sec. 3262; Ga. C. C. Sec. 2633; *Skinner* v. *Dayton*, 19 Johns. (N. Y.) 513, 537 (1822); *Mason* v. *Connell*, 1 Whart. (Pa.) 381, 388 (1836); *Monroe* v. *Conner*, 15 Me. 178 (1838); Cape Sables Case, 3 Bland (Md.) 606, 674 (1840); Slemmer's App. 58 Pa. 168, 176 (1868); *Solomon* v. *Kirkwood*, 55 Mich. 256 (1884); *Carr* v. *Hertz*, 54 N. J. Eq. 127 (1895); *Moore* v. *Price*, 116 Ala. 247 (1896); *Karrich* v. *Hannaman*, 168 U. S. 328, 334 (1897); *Lapenta* v. *Lettieri*, 72 Conn. 377 (1899); *Clement* v. *Norris*, 8 Ch. D. 129, 133 (1878).] The English law is opposed to this view [Lindley, 601; *Crawshay* v. *Maule*, 1 Swanst. Ch. 509 (1818); *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298 (1810); *Peacock* v. *Peacock*, 16 Ves. 49 (1809); *Ferrero* v. *Buhlmeyer*, 34 How. Pr. 33 (1867); Story Sec. 275.]

The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in doing so he breaks a contract, should, it is submitted, be recognized.

(3) One liable as a partner by estoppel may exonerate himself from future liability to third persons and his apparent partners as to any particular matter, or as to all future contracts and transactions of his apparent partners, in the same manner as though he were a partner in fact.

No corresponding provisions. [See section 21 (3) B.]

This paragraph is intended to declare the present law and to bring such person within the scope of this section of the Act.

(4) The foregoing provisions of this section do not in any manner affect any liability to the co-partners or apparent partners for any damages caused to them by reason of the breach of any contract.

Corresponding section 18 A. [See section 21 (4) B.]

Section 18 A provides for the same result on dissolution while the present paragraph provides for the three contingencies mentioned in the section.

Section 21. [Actions by or against the Partners.] (1) Proceedings in law or in equity may be brought by or against a partnership in the name of (*a*) the firm, (*b*) the firm and one or more of the partners, or (*c*) all the partners jointly as a firm. Where the partners are sued in the firm name, they shall appear individually in their own names; but all subsequent proceedings

shall nevertheless continue in the firm name, except that the judgment or decree shall be entered in the firm name and the names of all partners who have appeared or been served as parties defendants.

Corresponding provisions, sections 4 (4) A and 12 A.

This paragraph differs from the corresponding sections but is intended to declare only the present law, except that proceedings in the firm name are provided for. Such proceedings now exist in many jurisdictions. [English Supreme Court Rules, Order XLVIII A (Lindley, 885); Civil Code of Ala. (1907), Sec. 2506; Iowa Code (1897); Sec. 3468; Cal. C. C. Secs. 338, 414; Tenn. Code (1896) § 4484; S. Dak. pp. 341, 405 1905 and 1909; Minn. Rev. Laws § 4282; W. Va. Code (1906), Sec. 3787; Rev. Code of Mont. (1907) § 6497; Colby's Comp. Stat. of Neb. (1907) Sec. 1023; Mo. Anno. Stat. (1906), Sec. 892; Bates Anno. St. of Ohio, Sec. 5011; Compiled Laws of Utah (1907); Sec. 2927; Wis. Statutes (1898), Sec. 2612; Wyo. Rev. Stat. (1899), Sec. 3485; Ga. C. C. (1895), Secs. 5346, 2638.]

Under the present provision, the firm name is merely a convenient designation of all the partners, no third or fictitious legal person being implied. The difficulties indicated in note to 9 (6) B, arising from the decisions of the Federal Courts do not arise here. [*Great Southern* v. *Jones,* 177 U. S. 449, 454 (1900); *Macey* v. *Macey,* 135 Fed. 725 (1905); *Saunders* v. *Adams Express,* 136 Fed. 494 (1905); *Bruett* v. *Austin Co.,* 174 Federal, 668 (1909)], because all the partners who are served or appear are parties to the suit.

Care must be taken even under this section not to sue in the firm name where the partnership has its entire existence in another State and only one or more partners reside within the jurisdiction; for such a judgment is not a valid judgment binding in that other State upon the partnership property or the other partners. [*Russell* v. *Combefort,* 23 Q. B. D. 526 (1889); *Western Bank* v. *Perez* (1891), 1 Q. B. 304, 314; 1 Locke, Burney and Strange Annual Practice (Eng. 1910) 696-714; Freeman on Judgments, Secs. 120a, 232, 233, 359a; Black on Judgments, 23 Cyc. 684, 690, 693; Lindley, 301, 302.]

(2) Where a judgment has been obtained, as provided in the foregoing provision, it shall be satisfied out of the partnership property and the separate property of those partners only who have appeared as defendants or been served with process.

No corresponding provision.

This is merely a declaration of the present law as developed by statute and decision, [23 Cyc. 1240, 1241, 1245, 1266, 1375.] It complies with the constitutional provision against depriving one of his property without due process of law.

(3) Where the separate property of one or more of the partners has not been bound by a judgment under the foregoing provisions, the party claiming such right may:

(*a*) With leave of Court, summon such partner or partners to show cause why he or they should not be bound

by the judgment in the same manner as though they had been originally served with process. The summons must describe the judgment and be accompanied by an affidavit stating that the whole or a part of the judgment remains unsatisfied and specifying the amount due thereon. The defendant in his answer may deny the judgment or his liability upon the obligation upon which the judgment was recovered; or set up any defense which may have arisen subsequently, except a discharge from liability by the statute of limitations. The issues formed by these pleadings, subject to amendment, shall be determined as in other cases, but the judgment shall be only for the amount of the original judgment remaining unsatisfied with interest thereon; or

(*b*) Bring a separate action for the unsatisfied amount of the original judgment against any or all such partners. The facts specified in this provision as well as the facts constituting the cause of action shall be set forth in the complaint but the judgment shall be only for the unsatisfied amount of the original judgment with interest thereon.

No corresponding provisions.

Sub-paragraph (*a*) as drawn is intended to facilitate justice by enabling the entire matter to be settled in one action if possible. It is based upon Cal. Civ. Pro., Secs. 989-994; 2 Idaho Rev. Codes, Secs. 4860-4865; N. Y. C. P., Secs. 1932-1947; 2 S. Dak. Comp. Laws, p. 405, Secs. 466-471; Colby's Comp. Stat. of Neb., Sec. 1084; 1 N. C. Rev. Laws, (1905), Secs. 455-459. Rules of the Eng. Supreme Court, Order XLVIII A (8) [Lindley, 885]. The Constitutional provisions against special legislation, as in Pennsylvania [Const. Sec. 3 pl. 7], may cause difficulty; but this is doubtful [*Portland Cement Co.* v. *Allison,* 220 Pa. 382 (1908); *Paving Co.* v. *Rapid Transit Co.,* 220 Pa. 603 (1908); *Lumber Co.* v. *Carnegie Institute,* 225 Pa. 486 (1909)].

(4) At any time before trial, any partner or party interested, by petition to the Court, may intervene as party plaintiff or defendant with the firm or be made such by the petition of any opposing party. In any action, by or against the firm, on petition of the opposing party, the Court may order the firm or their attorneys to furnish the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in such firm in such manner and verified on oath or otherwise as the Court may direct. If, as plaintiffs in the suit, the firm or their attorneys shall fail to comply with such order, all

proceedings in the action may, upon application for that purpose, be stayed upon such terms as the Court may direct.

No corresponding provisions.

This provision follows the present law for the intervention of parties. The draft is based upon the English Supreme Court Rules, Order XLVIII A (2). [Lindley, 885.]

(5) Process against the firm for the purpose of binding partnership property shall be served, either upon any one or more of the partners, or upon any agent of the firm having at the time of service control or management of the firm business at the principal place of business within the jurisdiction. Notice shall be given in writing at the time of service to the party served stating whether he is served as partner or as agent or in both capacities and in default of such notice the person served shall be deemed to be served as a partner. A person served as a partner may appear specially for the purpose of denying that he is a partner, but such an appearance shall not preclude the plaintiff from otherwise serving the firm and obtaining judgment against the firm in default of appearance, if no partner has entered appearance in the ordinary form.

Corresponding section 4 (4) A. [See section 9 (5) B.]

This provision is based upon English Supreme Court Rules, Order XLVIII A, (3-8). It modifies the present law in that it provides for service upon an agent good as to joint property but not good against the separate property of any one partner.

(6) Where judgment has been obtained under the provisions of paragraph (1) of this section and execution has issued thereon, levy may be made upon all the property bound by the judgment; but, before satisfaction may be had out of the separate property of any partner, sale shall be made of any apparent partnership property within the jurisdiction not claimed by a partner or his legal representative to be separate property.

No corresponding provisions.

The results produced are as follows: (*a*) Where the suit is in the firm name, or the names of all the partners jointly as a firm, and service is made on an agent only, and no partner defends, the levy and sale can be on partnership property only. (*b*) When one or more partners are served or appear, the judgment binds the partnership property and the property of these partners; levy may be made on all such property; but satisfaction must

be had as provided. This method of securing satisfaction is the only change introduced into the present law.

Draft A, sections 4 (4) and 12, apparently provides that suit must be brought against the firm only; after judgment against the firm and exhaustion of the firm assets a new suit must be brought jointly or severally against the individual partners in order to subject their separate property to the payment of the firm obligations. It is submitted that draft A, in so far as it prevents the firm creditors from attacking the separate property of the partners until after the exhaustion of the firm assets is entirely in the interest of fraudulent debtors. Under the present paragraph fraudulent debtors cannot dissipate or conceal their separate property while their creditors are securing judgment against and seeking to exhaust the real or supposed assets of the legal person.

Since separate creditors cannot be paid out of joint property before every firm creditor has been satisfied, some protection should be thrown about the separate creditor as to the separate estate. This paragraph saves the separate estate to the separate creditor. The lien protects the firm creditor and the right to require prior sale of partnership properaty protects the separate creditor.

(7) The liability of a person liable as a partner by estoppel shall be enforced under the foregoing provisions in the same manner as though he were a partner in fact.

No corresponding provisions.

This paragraph is inserted under the theory stated in the note to section 18 *supra*.

(8) Where a fund is in the possession of the Court for distribution, firm creditors shall have priority as to firm assets and separate creditors as to separate assets, saving the rights of lien or secured creditors as heretofore.

No corresponding provisions.

This provision preserves the rule of marshaling of assets as practiced in equity and makes it effective in law also.

Section 22. [Fraudulent Conveyances.] (1) Any transfer or encumbrance of partnership property by any or all of the partners, made or given voluntarily and without a consideration to all the partners, as distinguished from a consideration to the individual members, while insolvent or in contemplation of insolvency shall be fraudulent and void as to existing partnership creditors.

(2) Every transfer of partnership property or charge thereon made, every obligation incurred and every judicial proceeding taken, with intent to hinder, delay or defraud any partnership creditor or other person of his demand against the partnership is void as against all partnership creditors and their

successors in interest and as against any persons upon whom the estate devolves in trust for the benefit of persons other than the partners.

(3) Every transfer of the property of a partnership or of a partner therein made after or in contemplation of the insolvency of such partnership with intent to give a preference to any other creditor of such partnership is void as against the creditors thereof; and every judgment confessed, lien created or security given in like manner and with like intent is in like manner void.

(4) Under the provisions of this section transfers by any or all the partners to one or more of the partners made when in fact insolvent are void as against the partnership creditors.

No corresponding section. [As the idea of the insertion of this section in a Partnership Act is new, we have not reprinted it as part of draft B.]

This section is new as to general partnerships and is intended to apply the law of fraudulent conveyances to partnerships to the same extent and in the same manner as it now applies to individual persons.

Part (1) of the section is based upon Cal. C. C., Sec. 3442, relating to fraudulent conveyances by individuals. Part (2) is derived from Cal. C. C., Sec. 3439. Part (3) is derived from Cal. Civ. C., Sec. 2496, relating to special partnerships. Part (4) is based upon the case of *In re* Terens, 175 Fed. 495, 499 (1910) and cases cited. It avoids the result reached in *Sargent* v. *Blake,* 160 Fed. 57 (1908).

Section 23. [Revocation of Guaranty by Change in Firm.] A continuing guaranty given either to a partnership or to a third person in respect of the transactions of a firm is, in the absence of an agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty was given.

Corresponding sections 17 A and 18 E. [See section 22 B.]

This section is identical with the corresponding sections except that the English Act speaks of "cautionary obligation" as well as "guaranty" and draft A omitting "cautionary obligation" in line one retains the words "and obligation" in the last line. As written the section is merely a declaration of the present law. [Beale's Parsons, Sec. 236.] This declaration is as proper in this draft as in draft A, even though the admission of a new partner does not, in the present draft, cause a dissolution or create a new firm. The new partner has the same powers of agency and discretion as any other partner. While the guarantor may have entire confidence in the other partners, he may not so trust the new partner or desire to extend the guaranty to include such partner's activities. When a partner retires, a dissolution results and the guaranty necessarily loses its effect.

PART IV.

RELATIONS OF PARTNERS TO ONE ANOTHER.

In the present draft, the mutual rights and duties of the partners to one another are defined as to (*a*) their rights and liabilities (sec. 25); (*b*) the partnership property (sec. 26); (*c*) the account of such property (sec. 27); (*d*) the character of such account (sec. 28); and (*e*) the profits from a rival business (sec. 29). The partner's interest in specific partnership property is then defined (sec. 30); the nature of the partner's share in the partnership is defined (sec. 31), and a method of subjecting such share to the partner's separate debts is provided (sec. 32).

To secure this result, the order and arrangement of the corresponding part of draft A (Part III), which is a copy of the arrangement of the English Act, has been changed.

The definition of partnership property as defined in sections 20 and 21 A, has been incorporated into section 9 *supra*, for the reasons there set forth. The provisions concerning the duration, continuance, or dissolution of the partnership as set forth in sections 25, 26 and 27 A are treated in Part V of this draft, treating of dissolution and liquidation.

Since, under the theory of this draft, the relations of the partners is with one another and not with a separate legal person, the caption of draft A is not adopted.

Section 24. [Relations Varied by General Consent.] The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Corresponding sections 19 A and 19 E. [See section 23 B.]

This section rejects the wording of section 19 A for that of 19 E because of the theory on which this draft is written.

Section 25. [Rules Determining Rights and Duties of Partners.] The interest of partners in the partnership and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners by the following rules:

Corresponding sections 24 A and 24 E. [See section 24 B.]

This provision is identical with the corresponding sections.

(1) Each partner is entitled to repayment of his contribution, whether by way of capital or advances, to the partnership property and to share equally in the profits and surplus remaining

after all liabilities are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the firm according to his share in the profits.

Corresponding provision, section 24 (1) A and 24 (1) E. Sec. 44 (a) E. [See section 24 (1) B.]

Under draft A partners contribute to all losses equally; under E as interpreted according to their respective shares in the profits. [*Garner* v. *Murray* (1904), 1 Ch. 57.] There is, however, an apparent confusion between 24 (1) E and 44 (a) E.

Where the shares in the profits are agreed on but losses are not considered, the losses should be shared in the same proportion as profits. Where neither are agreed upon, they are both shared equally. [Lindley, 385, 415; 30 Cyc. 690, 691.]

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him:—

(*a*) In the ordinary and proper conduct of the business of the firm; or

(*b*) In or about anything necessarily done for the preservation of the business or property of the firm.

(3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the legal rate per annum from the date of the payment or advance.

Corresponding sections 24 (2 and 3) A and 24 (2 and 3) E. [See section 24 (2 and 3) B.]

These paragraphs are identical with the corresponding ones.

(4) A partner is not entitled to interest on his share of the capital except from the date re-payment should be made.

Corresponding sections 24 (4) A and 24 (4) E. [See section 24 (4) B.]

This provision modifies the corresponding provisions so as definitely to declare the present law. [*Rodgers* v. *Clement*, 162 N. Y. 422 (1900); *Winchester* v. *Glazier*, 152 Mass. 316 (1890); 9 L. R. A. 424; Bates, Sec. 781, *et seq.*; 30 Cyc. 698.]

(5) All partners have equal rights in the management and conduct of the partnership business.

Corresponding provisions, sections 24 (5) A and 24 (5) E. [See section 24 (5) B.]

The change in the wording of this provision from that of the corresponding provision of draft A and the English Act is due to the desire to emphasize the fact that while in a matter of business judgment the majority

have a right to control, the majority have no right to deprive a partner of his rights as partner. The wording of draft A might be construed so as to give him only the right to take a part in the management, the extent of the part to be taken in either the management or conduct of the business to be determined by the majority. [Lindley, 355.]

(6) No partner shall be entitled to remuneration for acting in the partnership business.

(7) No person may be introduced as a partner in the business without the consent of all existing partners.

Corresponding provisions sections 24 (6 and 7) A and 24 (6 and 7) E. [See section 24 (6 and 7) B.]

Corresponding provisions of sections 24 A and 24 E, are identical with these provisions.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement may be done without the consent of all the partners.

Corresponding provisions, sections 24 (8) A and 24 (8) E. [See section 24 (8) B.]

Changing the nature of the business is an act in contravention of the agreement of partnership requiring the consent of all. So every act in contravention of any other agreement between the partners, whether express or implied in fact, requires the consent of all. The words "No act in contravention of any agreement" are employed to cover both these cases.

(9) The partnership books shall be kept at the place of business of the partnership (or the principal place if there is more than one) and every partner shall have access to and may inspect and copy any of them.

Corresponding provisions, section 24 (9) A and 24 (9) E. [See section 24 (9) B.]

This provision accepts some of the verbal changes of section 24 (9) A, but adopts the substance of section 24 (9) E. "Either in person or by his representative" of 29 (9) A is omitted because of the personal relation and the necessity that the other partners must have confidence in such representative. Where such representative is the legal representative, the Court safeguards the respective rights. The agent can inspect only where there is no reasonable objection. [*Trego* v. *Hunt,* (1896) A. C. 7; *Beavan* v. *Webb,* (1901) 2 Ch. 59; 30 Cyc. 447; Beale's Parsons, Sec. 154; Collyer, 557, 558.] The assignee has no right to inspect the books. [See 33 *infra.*] Since the words "when he thinks fit" are equivalent to declaring the right to exist at all times, their insertion is unnecessary because if he possesses the right, he may exercise it at his pleasure.

Section 26. [Partnership Property to be Used for Partnership Purposes.] All partnership property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

Corresponding sections 20 A and 20 E. [See section 25 B.]
This section is similar to the corresponding sections except that the definition of partnership property is transferred to section 9, *supra.*

Section 27. [Duty of Partner to Render Accounts.] Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives, when required by the partnership agreement or by law.

Corresponding sections 28 A and 28 E. [See section 26 B.]
This section differs from the corresponding sections by the addition of the words "when required by the partnership agreement or by law." The intent is to indicate the time when an account must be rendered. The duty to render an account arises by law only certainly when a Court so decrees. Each set of circumstances must decide this right and the need of the remedy must be shown. It has been held that the Court should decree an account only on dissolution; [*Loscombe* v. *Russell,* 4 Sim. 8 (1830) but this idea has been discarded [Collyer, Sec. 290; 10 Encyc. Pl. & Pr. 1059; Beale's Parsons, Sec. 207].

Section 28. [Partner Accountable as a Fiduciary.] (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership, or from any use by him of the partnership property, name, or business connection.

(2) This section applies also to the represenatives of a deceased partner engaged in the liquidation of the affairs of the partnership as legal representatives of the deceased partner.

Corresponding sections 29 A and 29 E. [See section 27 B.]
This section is intended to declare the present law. The word "dissolution" of section 29 (1) A is omitted because dissolution is a single act, not a partnership act, nor necessarily intended for the benefit of the firm; but purely a separate act producing a separate benefit. If the dissolution is produced by a wrongful act of one or more of the partners and damages result they may be obtained on liquidation; but any gain resulting from the dissolution is a separate gain. In other respects, section 29 (1) A is retained as preferable to section 29 (1) E because it enumerates the partnership activities.

Since so much of section 29 (2) E as relates to liquidation by a solvent partner is included in the word "liquidation" of part (1), part (2) of the present section omits those words. The only point to be covered by part (2) is the activities of the legal representative of the deceased partner engaged in liquidation.

Section 29. [Partner Accountable for his Profits from a Rival Business.] If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

Corresponding sections 30 A and 30 E. [See section 28 B.]
This section is identical with the corresponding sections except that "of" in the caption of section 30 A is changed to "from" by the present section.

Section 30. [Nature of a Partner's Interest in Partnership Property.] (1) The partners are co-owners of partnership property.

(2) A partner has no right to possess partnership property without the consent of his co-partners except for a partnership purpose.

(3) After liquidation, or settlement of the partnership affairs, a partner is entitled to receive his proportion of the surplus of the partnership assets in cash, unless a different method of distribution is agreed upon.

(4) Each partner's right as co-owner in partnership property is personal estate as between his heirs and executor or administrator.

(5) A partner's right as co-owner in partnership property is not assignable for any other than a partnership purpose except with the consent of all the partners.

(6) A partner's right as co-owner of partnership property is not subject to attachment or execution except on a claim against the firm.

(7) Nothing in this section shall prevent the partners by agreement permitting a partner to draw out of the firm money for his own use.

Corresponding sections 22 and 23 (1) A, and 22 and 23 (1) E. [See sections 29 and 31 (1) B.]
This section differs in substance and in form from sections 22 A and

22 E. It deals only with the nature of the partner's interest in specific property of the firm, as distinguished from what may be called his share in the partnership, *i. e.,* his rights to a return of capital or advances and his interest in the profits. The nature and assignment of the partner's share is the subject of section 31 (2), *infra.*

Under the entity theory the partner as an individual has no legal title to partnership property. The legal title is in the partnership entity. The partner may be regarded as the *cestui que trust* of the entity, or as having a chose in action against the entity. Under the entity theory the assignment of a partner's interest in specific partnership property, whether voluntary or involuntary, does not vest any legal interest in the property in the assignee. Such assignee is not a tenant in common with the remaining partners. Again, a separate creditor obtaining a judgment cannot attach any partnership property, because his debtor has no title in such property.

Under the aggregate theory of the present draft two positions in respect to a partner's interest in specific partnership property may be taken. One position is that the partners are owners in common of all partnership property, and that each partner may make a voluntary or involuntary assignment of his interest in any piece of partnership property for any purpose, the assignee becoming tenant in common with the remaining partners, these partners under the partnership agreement retaining their right to have the property applied to partnership debts before the assignee can obtain beneficial enjoyment of his interest. This position was taken by Holt, C. J., in the early case of *Heydon* v. *Heydon,* 1 Stalk. 392 (1693), and later, with most unfortunate results to firm creditors, by Gibson, J., in *Doner* v. *Stauffer,* 1 P. & W. (Pa.) 198 (1829).

The other position, and the one taken in this section under paragraphs (1), (5) and (6) is, that while the partners are co-owners of partnership property, a result of the partnership agreement is not merely that it is a contravention of the agreement for a partner to assign his interest as co-owner in a piece of partnership property for his own purposes without the consent of his partners, but that one of the legal incidents of partnership co-ownership is that a partner's right as co-owner is not assignable for any other than a partnership purpose except with the consent of all his partners.

The practical results of the entity theory, and the theory of the nature of the partner's interest in partnership property here adopted are the same in as far as they both render it impossible for separate creditors, or the assignees of a partner, to obtain any legal title in specific partnership property.

For a discussion of the subject of this section see [Lindley, 377 *et seq.;* Burdick, 63-68 122; James Parsons, Secs. 97 *et seq.;* Beale's Parsons, Sec. 178; Bates, Sec. 180 *et seq.*]

Paragraph (3) is intended to settle in the absence of an express agreement the question, whether on liquidation and the payment of all the partnership debts a partner has or has not the right to demand a sale of the remaining property, if any, or merely the right to demand a physical division.

Section 31. [Nature and Assignment of Partner's Share in the Partnership.] (1) A partner's share in the partnership is his interest in the profits and in the surplus of the partnership assets after the partnership debts are liquidated.

Corresponding provisions 22 A and 22 E. [See section 29 B.]

(2) Each partner's share in the partnership is personal estate as between his heirs and executor or administrator.

No corresponding provision.

The provision is necessary in spite of 30 (4), *supra,* as under the theory a partner's share in the partnership and his rights in specific property of the partnership are distinct things.

(3) An assignment by a partner of his share in the partnership does not of itself dissolve the firm, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require an account of the partnership transactions, or to inspect the partnership books; but merely entitles the assignee to receive the share of the profits to which the assigning partner would otherwise be entitled and the assignee must accept the account of profits agreed to by all the partners.

Corresponding provisions, sections 31 (1) A and 31 (1) E. [See section 30 B.]

This provision is intended to declare the present law. [George, 153; Beale's Parsons, Secs. 106, 305, 306; Story, Secs. 272, 307, 308; Bates, Secs. 158-168, 931-933; Lindley, 397, *et seq.,* 620; Jas. Parsons, Sec. 175; Collyer, 151, 161; 3 Kent, 59.] These authorities on the whole state that the mere assignment dissolves the firm. This may generally be the result, as where the assigning partner does not intend to take any further active part in the business or to continue the personal relation, but a partner may assign all his interest and yet continue the personal relation. If he neglects his personal relation or has conveyed so much of his property as to make him an unfit person to continue in partnership, the other partners may dissolve the firm under section 36 of this Act. But the mere fact of assignment without more cannot be said in all cases to be an act of dissolution. Dissolution is fully provided for in the last part of this Act, where the rights of dissolution and on liquidation are fully defined. If any partner desires to dissolve the firm, he may do so, according to the circumstances, under those provisions. Where the other partners seek to dissolve the partnership and compel the assigning partner to terminate the agency and liability, they should do so by decree of court or be liable for a breach of contract.

The word "all" is inserted in the last line so as to make it certain that the assigning partner must agree to the account of profits which the assignee is compelled to accept.

(4) In case of a dissolution of the partnership, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Corresponding provisions, sections 31 (2) A and 31 (2) E. [See section 30 (2) B.]

This provision is a declaration of the present law. It differs from the corresponding provisions in that "as respects all the parties or as respects the assigning partner" after "dissolution of the partnership" is omitted because under this draft only one kind of dissolution is recognized. [See Part V, *Infra.*]

Section 32. [Partner's Share Subject to Charging Order.] (1) On the application of any judgment creditor of a partner, the Court which entered the judgment, order or decree may make an order charging the partner's share in the partnership with payment of the amount of the judgment debt, or any unsatisfied amount thereof, with interest thereon; and may by the same or any subsequent order appoint a receiver of that partner's share of profits (whether already ascertained by an account or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favor of the judgment creditor by the partner, or which the circumstances of the case may require.

Corresponding provisions, section 23 (2) A and 23 (2) E. [See section 31 (2) B.]

This provision is taken from section 23 (2) E with slight verbal changes. The English section has been construed in *Brown* v. *Hutchinson* [(1895), 2 Q. B. 129]. The judgment creditor does not acquire any greater rights than the debtor is entitled to for his own benefit. [*Sutton* v. *English Co.* (1902), 2 Ch. 502; *Howard* v. *Sadler* (1893), 1 Q. B. 1; *Cooper* v. *Griffin* (1892), 1 Q. B. 740; *Scott v. Lord Hasting,* 4 K. & J. 633 (1858).] A charging order may be obtained upon the share of a lunatic partner [*In re* Hunt (1900), 2 Ch. 54; *In re* Leavesley (1891), 2 Ch. 1], but not, under the company cases, against executors in respect of a judgment obtained against their testator [*Stewart* v. *Rhodes* (1900), 1 Ch. 386]. [See also *Nixon* v. *Nash,* 12 Ohio St. 647 (1861); *Clagett* v. *Kilbourne,* 1 Black, 346 (1861); *Phillips* v. *Cook,* 24 Wend. 389 (1840).]

Three alterations are made upon section 23 (2) A. "The Court" is described as "The Court which entered the judgment." "Or any unsatisfied amount thereof" is added to "the amount of the judgment debt." "Profits" are described as "(whether already ascertained by an account or accruing)" instead of "(whether already declared or accruing)" because profits are "ascertained by an account" and dividends are "declared" under the established legal terminology.

(2) The share charged may be redeemed at any time or in case of a sale being directed, may be purchased without thereby causing a dissolution, unless as provided by section 36,—

(*a*) With their separate assets, by any one or more of the partners, or

(*b*) With partnership funds, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

Corresponding provisions, sections 23 (3) A and 23 (3) E. [See section 31 (3) B.]

This provision modifies the corresponding provisions by permitting the partners or the firm to redeem the charge or purchase the share without causing any dissolution, unless such intention is manifested as provided by section 36, the amount paid becoming a matter of account in liquidation. This is a recognition of the principle that the personal relation may continue even though, for the time, the charged partner may have no pecuniary interest in the firm. Whether a dissolution may be rightfully had depends upon the circumstances; and whether it is desirable depends upon the other partners. Where the partner's interest is sold, he may cause a dissolution so as to terminate the agency and liability, but his right to an account may have been lost.

(4) Process for any order under this section shall be served on the judgment debtor and his partners or such of them as are within the jurisdiction, and such service shall be a good service on all the partners. Process on the application of any partner shall be served on the judgment creditor and the other partners or such of the other partners within the jurisdiction as shall not concur in the application; such service shall be a good service on all the partners. All orders made on such process shall be served in like manner and with like effect.

No corresponding provisions. [See section 31 (4) B.]

This provision is taken from English Supreme Court Rules, Order XLVI, RR, 1a and 1b (Lindley, 393).

Section 33. [Continuance of Partnership Beyond Fixed Term.] Where a partnership, entered into for a fixed term, is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership at will.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

Corresponding sections 27 A and 27 E. [See section 32 B.]

This section follows the wording of section 27 E and rejects the last five words, "but as a partnership at will," of section 27 A because part 2 of the section merely defines "continuance" as employed in the first part, which defines the partnership as a partnership at will. The words quoted are therefore unnecessary.

PART V.

DISSOLUTION AND ITS CONSEQUENCES.

This part of the Act treats of all matters concerning the dissolution and liquidation of the firm. Because of the prevailing confusion on this subject and the uncertainties in Part IV A [see note 3, *supra*, p. 5], the corresponding part of draft A numerous alterations have been introduced. All sections relating to dissolution have been transferred from the other parts of the Act to this part. Thus so much of section 16 A as treats of a retiring partner; section 25 A, concerning expulsion, are all treated in this part of the present draft.

Dissolution is defined (section 34); the fact that it does not terminate the partnership is stated (section 35); the methods of causing it are set forth (sections 36 and 37); the effect of dissolution on the partners' authority (section 38); the notice necessary to make it effective is declared (section 39), and the right of partners to give notice is provided for (section 40). The effect on the partners' rights as to (*a*) existing liability in (section 41); (*b*) the application of partnership property in (section 42); (*c*) profits made after dissolution in (section 43); (*d*) dissolution in cases of fraud and misrepresentation in (section 44), and (*e*) as to when the right to enforce these rights arises in (section 45). Finally the rules obtaining on the dissolution of the the partnership assets are set forth in section 46.

Certain alterations, discussed under the respective sections, in the present law have been made so as to make the rights and liabilities certain. These alterations occur in sections 35, 36, 38 and 42. In the other sections alterations have been made from draft A and the English Act, but they are submitted as declarations of the present American law.

Sections 41 A and 41 E are omitted. These provisions relate to matters of contract and should be controlled by the general contract law. As worded the sections declare English law [Lindley, 625-630]; not the American law [30 Cyc. 439, 686; Bates, Sec. 802-810; Beale's Parsons, Secs. 418, 419.]

Section 34. [Dissolution Defined.] The dissolution of a partnership is the breaking up of the personal relation, caused by one or more of the partners ceasing to be associated in the business.

No corresponding sections. [See section 33 B.]

Section 35. [Partnership Not Terminated by Dissolution.] On dissolution the partnership is not terminated, but continues

until settlement or liquidation of all partnership affairs is completed.

No correspondiig sections. [See section 34 B.]

Under part (1) a dissolution occurs as soon as one partner determines to cease being a partner, but becomes effective as to any one partner or to all partners only when notice is received. Even then third persons are not affected before they have notice of the dissolution.

Under part (2), defining the effect of dissolution as to agency and liability, each particular person must be considered. If a partner has no notice, he has full authority to bind as though no dissolution had been had. But if he deals with a third person who had notice that another partner had dissolved the firm, such person cannot hold the firm. The two questions under this section are: (1) Did any partner dissolve the firm? (2) Did the plaintiff, or party contesting, have notice of the dissolution?

Part (3) declares the rights of the partners upon dissolution. A bankrupt partner cannot make any contract to bind himself and therefore cannot bind the firm or act for it. When one dissolves the firm in contravention of the agreement, he forfeits his right to wind up the business, but is entitled to withdraw his interest as provided by section 42, *infra*. He can, of course, protect his interest as in other cases. Third persons can deal with such partner so as to bind the firm within the scope of the authority conferred by section 40, *infra*, unless they have notice that he has no authority; but the partner is liable in damages or to indemnify the other partners on liquidation. The other partners may restrain his actions or give notice of his want of authority.

Section 36. [Methods of Dissolution.] The dissolution of the partnership is produced:

(1) Rightfully under the partnership agreement,—

(*a*) By the manifest intention of any or all of the partners at the termination of the definite term or particular undertaking specified in an agreement;

(*b*) By the express will of any or all of the partners when no definite term or particular undertaking is specified;

(*c*) By the express will of all the partners, not having suffered their interests to be charged for their separate debts, whether before or after the termination of any specified term or particular undertaking;

(*d*) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the partnership agreement.

(2) In contravention of the partnership agreement, where the circumstances are not such as to permit a dissolution under any other provision of this section, by the express will of any one or more of the partners at any time;

(3) By the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By any partner being declared a bankrupt;

(6) By decree of Court.

Corresponding sections 18, 25, 26, 32, 33, 34 A and 25, 26, 32, 33, 34 E. [See section 35 B.]

This section is modeled upon Cal. Civ. C., Sec. 2450. There is considerable confusion in the law on the subject of dissolution. [Beale's Parsons, 399; Wood's Collyer, 166n; 30 Cyc. 603-619.] The attempt is made to eliminate this confusion by recognizing the facts as they exist. The weight of authority is in accordance with paragraph (2) of this section. This power of a partner to dissolve the partnership in contravention of the partnership agreement, it is submitted, is in accordance with fundamental principles of law. [See notes on section 20 (2), *supra.*]

The part of section 18 A, which treats of a partial dissolution, has been rejected because under the theory of this draft there is no such thing as a parital dissolution. So much of section 33 A as declares a right in the other partners to dissolve the firm when one member assigns his interest has been rejected for the reasons set forth under sections 31 (3) *supra.*

Because of the theory that the retirement of any partner produces a dissolution, section 25 A and 25 E treating of the expulsion of a partner has been omitted and part (*d*) of this section inserted.

The rights of the parties upon a dissolution in contravention of the agreement are safeguarded by sections 38 and 42 *infra.* The other parts of this section are in harmony with the corresponding sections.

Section 37. [Dissolution by Decree of Court.] On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a*) When a partner has been found lunatic by inquisition, or is shown to the satisfaction of the Court to be of unsound mind, in either of which cases the application may be made either on behalf of that partner by his committee or next friend or person having title to intervene or by any other partner:

(*b*) When a partner, other than the partner suing, becomes in any other way incapable of performing his part of the partnership contract:

(*c*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated prejudicially to affect the carrying on of the business:

(*d*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in patnership with him.

(*e*) When the business of the partnership can only be carried on at a loss:

(*f*) Whenever circumstances have arisen, which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Corresponding sections 35 A and 35 E. [See section 36 B.]

This section is a declaration of the present law and is identical with section 35 A.

Section 38. [Authority of Partners After Dissolution.] (1) The dissolution terminates all authority in any one or more of the partners to act for the firm or the other partners, except so far as may be necessary to wind up or liquidate the partnership affairs or to complete transactions begun but unfinished at the time of the dissolution, and becomes effective as to any given person only when he receives notice as provided by section 39 of this Act.

Corresponding provisions sections 38 A and 38 E. [See section 37 (1) B.]

This provision differs in substance from the corresponding provisions in that if a partner has no notice of the dissolution and deals with a person who also has no notice, it is made certain that the transaction is not only a partnership transaction as to the third person, but as between the partners.

(2) Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this provision does not affect the liability of any person who has after the bankruptcy represented himself or enabled another to represent him as a partner of the bankrupt as declared by section 18 of this Act.

Corresponding provisions, sections 38 A and 38 E. [See section 37 (2) B.]

This provision amends the corresponding provisions by changing "knowingly suffers himself to be represented as a partner" to read "enabled another to represent him as a partner," for the reasons set forth under section 18, *supra*.

(3) Where the partnership agreement does not provide otherwise, a dissolution gives to each partner, not bankrupt, the right to liquidate or wind up the partnership affairs, except that any partner dissolving the partnership in contravention of the partnership agreement shall be entitled only to withdraw his interest in the partnership as provided by section 42 of this Act.

No corresponding provisions. [See section 37 (3) B.]

A bankrupt partner cannot make any contract to bind himself and therefore cannot bind the firm or act for it. When one dissolves the firm in contravention of the agreement, he forfeits his right to wind up the business, but is entitled to withdraw his interest as provided by section 42, *infra*. He can, of course, protect his interest as in other cases. Third persons can deal with such partner so as to bind the firm within the scope of the authority conferred by paragraph (1) of this section, unless they have notice that he has no authority; but the partner is liable in damages or to indemnify the other partners on liquidation. The other partners may restrain his actions or give notice of his want of authority. [See section 12, *supra*.]

Section 39. [Notice Required on Dissolution.] (1) Where the dissolution is by death or the act of one or more of the partners, the act of any partner not having actual knowledge or notice of the dissolution is binding, as to each other, on the partners, not bankrupt or deceased, to the same extent and in the same manner as if dissolution had not taken place.

No corresponding provisions unless sections 36 (5) A and 36 (3) E. [See section 38 (1) B.]

This provision is possibly a departure from the present law. [Beale's Parsons, Secs. 309, 310, 318, 342, 343, 351; Mechem, Secs. 245, 258, 259, 260, 261, 266; Collyer, Secs. 102, 103; 30 Cyc. 653, 670; Story, Secs. 265, *et seq.*, 319, 334, 336; Bates, 570, *et seq.;* Conyngton, Secs. 53, 72; Burdick, 56; Shumaker, Secs. 119, 120; 3 Kent. Com. 53.] It is said that where the firm is terminated by operation of law, *i. e.*, by death, bankruptcy, by being unlawful, or by decree of Court, every person must take notice of such facts. This statement is made generally and includes the partners. As to the partners, to whom only this provision relates, they must take notice of bankruptcy, and that the firm or the business is unlawful; and they have actual knowledge or notice of dissolution by decree of Court; but that they do or must necessarily have actual knowledge or notice of the death of any one partner does not necessarily follow. That death is notice in itself is admittedly the common law. This may still be proper in small countries or in England, but to say that every person knows of the death of another even in a moderately large city, in the whole State or in all the States, is beyond reason.

To hold that a partner acting for the firm bona fide in ignorance of the death of one of his co-partners must assume the entire liability, even though all the other partners are ignorant of the death of the partner and even though such partner was entirely inactive and may have resided at any distance from the actual place of business, is entirely unjust to the acting partner or partners. The rule of the common law has been modified as to the law of agency. [Story on Agency (1882), 598; *Cassiday* v. *M'Kenzie*, 4 W. & S.

(Pa.) 282 (1842); *Clark & Sykes,* Sec. 185; Cal. C. C., Sec. 2356; Dak. C. C., Secs. 1150, 1151; Md. Rev. Code, 1878, 388, Art. 44, Sec. 31; Saunder's Rev. Civil Code of La. (1909)., Sec. 3032; S. C. Gen. Stat. (1882), Sec. 1302; Kent Comm. 646; Mechem on Agency, Sec. 245; Blackwood Wright (2d Ed. Eng.) on Principal and Agent, 332, *et seq.;* English Conveyancing Act (1881), Sec. 47; English Bankrutcpy Act (1883), Sec. 38. See Lindley, 240, *et seq.*]

(2) After dissolution third persons by dealings with any partner, not bankrupt, may bind the other partners in the same manner and to the same extent as if the partnership had not been dissolved, except

(*a*) The liability of a deceased, bankrupt, or secret and inactive partner shall be limited to his interest in the existing partnership property;

Corresponding seitions 36 (5) A and 36 (3) E. [See section 38 (2a) B.]

This provision follows the provisions of the corresponding sections except that any interest of the deceased, bankrupt or secret and inactive partner which may then exist in the partnership property shall be subject to the liability. This exception is made so as to enable any such creditor to secure satisfaction out of the partnership property and to prevent confusion as to whether such property is or is not subject to the liability. It has the same reason for its enactment as the statutes concerning reputed ownership. [Lindley, 242, 745.]

(*b*) Where the dissolution has been caused by an event which made it unlawful for the business of the firm to be carried on;

No corresponding provision. [See section 38 (2b) B.]

(*c*) When such third person, having had business relations with the firm prior to the dissolution by which a credit was extended upon the faith of the partnership, has had actual knowledge or notice of the dissolution;

Corresponding provisions sections 36 (2) A and 36 (1) E. [See section 38 (2c) B.]

This provision follows:—with slight verbal changes,—Section 36 (2) A instead of 36 (1) E, which merely requires that "such third person" shall have "had dealings with the partnership prior to the dissolution." The provision, as written, has the support of authority. [Beale's Parsons, Sec. 319; Mechem, Sec 262; Burdick, 57; 2 Bates, Sec. 613, 614; 30 Cyc., 671; Cal. C. C., Sec. 2453.] There is also authority for the wording of the English Act. [James Parsons, Secs. 179, 180, 181; Lindly, 249; Pollock, 98; 3 Kent Comm., 67; Collyer, 163n.; Shumaker, Sec. 121; Mechem, 261, 262; Bates, 612, 613.]

Much can be said in favor of the principle expressed in the English Act, that a person who holds out another as his agent is bound by that agent's acts until the principal has notified all those with whom the agent has had

dealings that the agency is revoked. The practical impossibility of the partners knowing by any feasible system of bookkeeping all the persons with whom they have had dealings, unless credit has been extended, tends to the wording of section 36 (2) A.

(*d*) When such third person has not had dealings with the firm prior to the dissolution by which a credit was extended to the partnership prior to the dissolution and the fact of dissolution has been advertised in a daily newspaper of general circulation of the place (or of each place if more than one) in which at the time of dissolution the partnership business was regularly or notoriously carried on; or the fact of dissolution is notorious in the community in which such third person is engaged in business.

Corresponding provision, section 36 (3 and 4) A. [See section 38 (2d) B.]

This provision combines the corresponding provisions which are followed except that the business is described as "regularly or notoriously carried on" instead of simply "carried on." This amendment is made so as to indicate more clearly what places are intended and to what extent the business must be carried on to necessitate advertisement. This problem has caused trouble as regards corporations, and should be avoided here as far as practicable.

(3) Where a person or partnership takes over the property or business of a dissolved partnership and continues the business in such a manner as to represent the continued existence of the dissolved partnership, such person or partnership shall be liable for the existing liabilities of the dissolved partnership to any person who has not had actual knowledge or notice of such change within thirty days after the taking over of the property or business, unless such notice is prevented by the fraud of the members of the dissolved partnership.

No corresponding provision. [See section 38 (3) B.]

This provision is entirely new and is drafted upon the theory of the statutes of reputed ownership. It is intended to prevent frauds upon existing creditors by the continuance of the business after the retirement of a partner by the other partners or by third persons in such a manner as not to indicate a dissolution.

(4) Notice under the provisions of this Act, unless the context indicates otherwise, is had where it is in good faith:

(*a*) Actually delivered to the person to be charged; or

(*b*) Actually delivered to his agent or at his place of business during business hours; or

(*c*) Actually delivered to a proper person at his residence or last known address; or

(*d*) Properly mailed in a registered letter addressed to his last known address; or

(*e*) Reasonably to be presumed from the knowledge of other facts by the person to be charged with notice.

No corresponding provision. [See section 38 (4) B.]

Because of the diverse meanings of notice in the law [29 Cyc. 1110], this provision is added so as to eliminate uncertainty as to the meaning of the term as employed in this Act.

Section 40. [Right of Partners to Notify Dissolution.] On the dissolution of a partnership any partner may publicly notify the same, and may require the other partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Corresponding sections 37 A and 37 E. [See section 38 B.]

This section is identical with the corresponding sections excepting that "or retirement of a partner" is omitted, because under the theory of this draft the retirement of a partner causes a dissolution.

Section 41. [Discharge of Partner from Liability on Dissolution.]

(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

Corresponding provisions sections 16 (2) A and 16 (2) E. [See section 40 (1) B.]

This provision is identical with the corresponding sections and declares the present law. [30 Cyc. 608, 612; Beale's Parsons, Sec. 324.]

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the existing partnership creditors, and the person or partnership continuing the business, and this agreement may be either express or inferred from the course of dealing between the creditors, having notice of the dissolution, and the person or partnership continuing the business.

Corresponding sections 16 (3) A and 16 (3) E. [See section 40 (2) B.]

This provision is intended to declare more definitely the present law as declared in the corresponding provisions. To this end slight verbal changes have been made. [30 Cyc. 615; Beale's Parsons, Sec. 325, *et seq.;* Lindley, 271, *et seq.*] The partner "is discharged" instead of "may be discharged" by such an agreement. An agreement with a person continuing the business is equally effective. The course of dealing can raise a contract only where the dissolution is known.

(3) Where the person or partnership continuing the business agrees to assume all the existing liabilities of the dissolved firm, the partners, not being engaged in continuing the business, with whom the agreement is made shall be merely sureties for the payment of such liabilities as to all persons having actual knowledge or notice of the agreement.

No corresponding provisions.

This provision is intended to declare the more general present law [30 Cyc. 612; Beale's Parsons, 414n (1); Lindley, 252, 269, 277; Bates, secs. 532, 533, 534]. The intention is to enable a partner, upon ceasing to be a partner, to be certain as to his liabilities and the time of their duration by giving notice that he is to become merely a surety. [Childs on Suretyship, 17, 172n; Stearns on Suretyship, 24, 125, 484; 27 Amer. & Eng. 433, 464.]

Section 42. [Rights of Partners to Application of Partnership Property.]

(1) Where the partnership is rightfully dissolved, every partner is entitled, as against the other partners and all persons claiming through them in respect of their interests as partners, to have the partnership property applied in payment of the debts and liabilities of the partnership, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm, and for that purpose any partner or his representatives may apply to the Court to wind up the business and affairs of the partnership. Provided, however, that where the dissolution is caused by the expulsion of any partner from the business, as provided by this Act, the expelled partner shall be entitled only to receive what may be due him from the partnership if he is discharged from all existing partnership liabilities either by payment thereof or by agreement to that effect as provided in the last foregoing section.

Corresponding sections 39 A and 39 E. [See section 41 (1) B.]

This provision is intended to declare the present law as declared in the

corresponding sections. Slight verbal changes are made necessary because of the theory and policy of this draft. Because of the recognition of a dissolution in contravention of the agreement, this provision is limited to rightful dissolutions. Because a partner may apply for an account at any time, the words "on the termination of the partnership" have been omitted. Because expulsion from the business can only take place under a power conferred by the partnership agreement (Section 36 (1d) *supra*) and is, therefore, a rightful method of dissolution, special provision had to be made for such case. This part of the present draft is new. Where a partner is expelled from the business, there is no intention that the business should be wound up; nevertheless the expelled partner should be able to terminate the liability and agency and to discharge himself from existing liability. The first two of these he may do by proper notice, and the last the continuing partners must effect unless they desire to have the expelled partner wind up the business by himself or by legal process.

(2) Where the dissolution is in contravention of the partnership agreement as specified by section 36 (2) of this Act the rights of the partners shall be:

(*a*) Every partner shall be entitled to receive what is due him in respect of his interest in the partnership, subject to any agreement to the contrary, and for that purpose may apply to the Court.

(*b*) The partners, not having wrongfully caused the dissolution, shall be entitled, as against the partner or partners retiring from the business, to continue the business under the firm name at the same place or places with all the rights in any good-will or existing partnership contracts for the period of the agreed term or particular undertaking; and as against the partner or partners wrongfully causing the dissolution to damages for the breach of the partnership agreement and to a forfeiture of their interests in all such future rights.

(*c*) Where the partner suing has wrongfully dissolved the partnership or has been rightfully expelled from the business, the Court shall not order the affairs of the partnership to be wound up or liquidated unless such partner's interest in the partnership cannot otherwise be determined.

No corresponding provisions unless section 18 A. [See section 41 (2) B.]

This provision is made necessary by section 20 (2), *supra*.

Section 43. [Right to Profits Accruing after Dissolution.] (1) Where any person, upon dissolution of a partnership, has ceased to be associated in the business continued by one, or more of his partners or other persons with the capital or assets of the dissolved partnership without any settlement of accounts as between him or his estate, and the person, or, partnership, continuing the business, in the absence of any agreement to the contrary, he is entitled at the option of himself, or his legal representatives, after all the other creditors of the partnership, if any, continuing the business, have been paid, to the amount of his interest in the assets of the dissolved partnership, and such share of the profits made since the dissolution as the Court may find attributable to the use of his share of the assets of the dissolved partnership; or as an ordinary creditor, to the amount of his interest in the assets of the dissolved partnership with interest at the legal rate per annum.

Corresponding provision, sections 42 (1) A and 42 (1) E. [See section 42 (1) B.]

This provision is based upon the present law. [Collyer, Sec. 304; Bates, Sec. 794-802; *Bernie* v. *Vandever*, 16 Ark. 616 (1855); *Washburn* v. *Goodman*, 17 Pick. 519 (1836).] It follows the corresponding sections, except that where the retiring partner claims profits, his entire claim is postponed to that of the other creditors of the partnership continuing the business; while under the corresponding section only claims to profits are postponed to the other creditors where the business is continued by a partnership.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or retired partner and that option is duly exercised, the estate of the deceased or the retired partner or his estate, as the case may be, is not entitled to any further or other share of the profits; but if any partner assuming to act in the exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Corresponding provisions, sections 42 (2) A and 42 (2) E. [See section 42 (2) B.]

This provision is identical with the corresponding provisions except that "outgoing partner" is changed to "retired partner," the customary phrase of this draft.

Section 44. [Rights Where Partnership is Dissolved for Fraud or Misrepresentation.] Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) To a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him; and

(*b*) To stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities; and

(*c*) To be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

Corresponding sections 41 A and 41 E. [See section 43 B.]

This section declares the present law and is identical with the corresponding sections. [Bates, Sec. 595; Beale's Parsons, Sec. 10; Shumaker, 418; Lindley, 524-526.]

Section 45. [Accrual of Actions.] Subject to any agreement and the provisions of this Act, the right to an account shall accrue to any partner or the legal representatives of any deceased or bankrupt partner in respect of such partner's interest in the partnership, at the date of the dissolution; and the amount due in respect of such partner's share is a debt accruing as to any matter covered by an account at the date the account is stated, and, as to any matter omitted from the account at the date of notice of the liquidation of such matter.

Corresponding sections 43 A and 43 E. [See section 44 B.]

The section as drawn in distinguishing between the right to an account and the debt due on an account differs from the corresponding sections. It is submitted as a more satisfactory solution of a problem which has been the subject of much conflict in the decisions. [30 Cyc. 718 and cases cited; Beale's Parsons, Sec. 228 n.; Bates, 942-952; Collyer, 456, *et seq.*; James Parsons, 910; Lindley, 554 *et seq.*]

Section 46. [Rules for Liquidation.] In the settling of accounts between the partners after a dissolution of the partnership, the following rules shall be observed subject to any agree-

ment, but such agreement shall not affect the rights of persons other than parties and privies thereto.

Corresponding provisions 44 A and 44 E. [See section 45 B.]
Identical with corresponding sections, except that the clause in relation to third persons is added.

(1) The assets of the partnership are:

(*a*) The profits of the business,

(*b*) The partnership property,

(*c*) The contributions of the partners necessary for the payment of all partnership liabilities.

No corresponding provisions. [See section 45 (1) B.]
Inserted to avoid the present confusion as to whether the contributions of the partners towards the losses of the partnership is a partnership asset or not. [See the bankruptcy cases. *In re* Bertenshaw, 157 Fed. 363 (1907); *In re* Forbes, 128 Fed. 137 (1904); *Barry* v. *Foyles*, 1 Pet. 311 (1828); *West* v. *Lea*, 174 U. S. 590 (1899); *Vaccaro* v. *Bank*, 103 Fed. 436 (1900); *In re* Mercur, 122 Fed. 384 (1903). That such contributions are assets appears to be supported by the better reasoning. (*In re* Forbes, *supra; Vaccaro* v. *Bank, supra*).]

(2) The liabilities of the partnership shall rank in order of payment as follows:

(*a*) That due to creditors other than partners,

(*b*) That due the partners other than for advances, capital and profits,

(*c*) That due the partners in respect of advances,

(*d*) That due the partners in respect of capital,

(*e*) That due the partners in respect of profits.

Corresponding provisions 44 (1, 2, 3, 5) A and 44 (b, 1, 2, 3, 4) E. [See section 45 (2) B.]
Identical in results though differently expressed than the corresponding sections.

(3) The assets shall be applied to the satisfaction of the foregoing liabilities in the order of their declaration in part (1) of this section.

No corresponding provision. [See section 45 (3) B.]

(4) The partners shall contribute to the whole amount, if any, necessary to satisfy the foregoing liabilities as provided by

section 25 (1) but if one or more, but not all of the partners are insolvent, or not being subject to process refuse to contribute, the solvent partners subject to process shall contribute the amounts which they would have had to contribute to pay the foregoing liabilities had all the partners contributed; and also equally, or ratably as the case may be, the additional amount, if any, needed to pay all the foregoing liabilities to third persons.

Corresponding sections 44 (4) A and 44 (a) E. [See section 45 (4) B.]

The provision is similar to the corresponding provisions in that it provides for a share in the losses in proportion to the share in the profits. It provides, as the corresponding provisions omit to provide, for the contingency that one or more, but not all of the partners may be insolvent or not subject to process. As drawn the provision is intended to express as nearly as may be in view of the state of the authorities the present law [30 Cyc. 692].

The last part of the provision is based on the theory that each partner takes an equal risk, and should bear equally the consequences of one of their number becoming insolvent.

(5) Where the separate assets of a partner are in possession of the court for distribution, the claims of the partners arising out of partnership transactions and the claims of the creditors of the partnership shall be postponed to the claims of the other creditors of the partner.

Corresponding provisions 44 (4 A). [See section 45 (5) B.]

The provision is inserted to further emphasize the rule as expressed, 21 (8) *supra,* and to avoid all doubt that the claim of the partners to contribution shall be postponed to the claims of other creditors.

The corresponding section is directly *contra;* providing that the claim of the firm against the partners shall rank equally with the claims of other persons against them. This provision of draft A is entirely at variance with the present English and American Law [30 Cyc. 552, 533]. Even under the theory of draft A it is not necessary to place the claims of the firm against the partner on a parity with the claims of his other creditors, any more than it is necessary to place the claims of the partners against the firm on an equality with the claims of the other creditors of the firm. The corresponding provision in draft B is, therefore, identical with the provision as here drawn.

(6) Nothing in this section shall be construed to release the liability of a partner under section 17 of this Act until all the foregoing liabilities to third persons are discharged.

No corresponding provisions. [See section 45 (6) B.]

So much of part 5 of section 43 A as reads, "This claim of the firm against the partners shall rank equally with the claims of other persons against them" is omitted. It is entirely at variance with the present English and American law. [No. 30 Cyc. 552, 553; Cal. C. C. 1432.]

DRAFT A.

BEING THE LAST DRAFT OF AN ACT TO MAKE UNIFORM THE LAW OF PARTNERSHIP SUBMITTED BY MR. JAMES B. AMES.

[The notes, except those in brackets, are Mr. Ames's notes. A few obvious typographical errors have been corrected.]

PART I.

NATURE OF PARTNERSHIP.

Section 1. [Partnership Defined.] (1) A partnership is a legal person formed by the association of two or more individuals for the purpose of carrying on business with a view to profit.

New.

(2) But a joint stock association, whether incorporated or not incorporated, whose members are fluctuating by reason of the transferability of their shares, and whose business is also managed by a board of directors, committee or individual officer, is not a partnership within the provisions of this Act.

E. A. § 1, Subs. 2.

Section 2. [Rules Determining Existence of Partnership.] In determining whether a partnership does or does not exist, regard shall be had to the following rules:

E. A. § 2.

(1) In the absence of an estoppel by misrepresentation (provided for in Section 13 of this Act) persons who are not partners as between themselves are not partners as to third persons.

Represents the law in a large majority of the States.

(2) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

E. A. § 2, Subs. (1).

(3) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

E. A. § 2, Subs. (2).

(4) The receipt by a person of a share of the profits of a business or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

E. A. § 2, Subs. (3) Omitting clause about *prima facie* evidence.

(*a*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

E. A. § 2, Subs. (3) *a*.

(*b*) A contract for the remuneration of an employee or agent or landlord of a person engaged in a business by a share of the profits of the business does not of itself make the employee or agent or landlord a partner in the business or liable as such:

E. A. § 2, Subs. (3) *b*, with addition of word "or landlord."

(*c*) A person being the legal representative, widow or legatee of a deceased partner, and having by way of annuity or otherwise a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

E. A. § 2, Subs. (3) *c*, with certain formal changes.

(*d*) The advance of money by way of a loan to a person or partnership engaged or about to engage in any business on a contract with that person or partnership that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or in the partnership carrying on the business or liable as such.

E. A. § 2, Subs. (3) *d*, omitting proviso requiring contract to be in writing.

(*e*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the good-will of the business is not by reason only of such receipt a partner in the business or liable as such.

E. A. § 2, Subs. (3) *e*.

Section 3. [Profit-Receiving Lender or Seller Resembles a Special Partner.] In the event of any person or partnership to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section or of any buyer of a good will or other property in consideration of the promise of a fixed amount of money and a share of the profits or an amount equal to a share in the profits of the business being adjudged a bankrupt, or entering into an agreement to pay his creditors less than one hundred cents on the dollar, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan and the seller of the good will or other property shall not be entitled to recover anything in respect of his sale, until the claims of the other creditors of the borrower or buyer have been satisfied. Mortgages or other securities given by the borrower or buyer to secure a loan or the payment of the purchase money upon such a contract as is mentioned in the last foregoing section shall be void as against the other creditors of the borrower or buyer.

E. A. § 3, which corresponds to § 5 of Bovill's Act except the last sentence, which departs from the law as laid down in *Badeley* v *Consolidated Bank*, 38 Ch. Div. 239. [Omitted from drafts B and C for reasons stated in preliminary note to Part II, C.]

Section 4. [Firm an Entity Distinct From the Partners.] (1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name.

New.

(2) The legal title to partnership property is vested in the firm, if property acquired under similar circumstances by a natural person would vest in such person. In all other cases the

partnership property belongs to the firm as a *cestui que trust* or equitable owner.

New.

(3) Upon obligations in favor of the firm against a stranger or against one or more of the partners, the firm as such is the obligee; and upon obligations in favor of a stranger or of one or more of the partners against the firm, the firm as such is the obligor.

New.

(4) Actions upon claims in favor of or against a firm must be brought in the firm name, the process against the firm being served either upon one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there.

New.

Section 5. [Registration of Partnerships.] (1) Every partnership transacting business in this state must file, in the office of the Secretary of State, a certificate to be indexed by said Secretary stating the firm name of the partnership, the general nature of its business, and the full name and residence of each member of the partnership.

New.

(2) The certificate prescribed in the foregoing paragraph must be signed by the partners and acknowledged before some officer authorized to take acknowledgements of conveyances of real estate.

New.

(3) Upon every change of members of a partnership transacting business in this state, a new certificate, duly signed and acknowledged by all the partners in the new firm must be filed with the Secretary of State.

New.

(4) Every Secretary of State shall keep a register of the names of firms and persons mentioned in the certificates filed in his office pursuant to this Act, entering in alphabetical order the name of every such partnership and of each partner interested

therein. An officially certified copy of the register shall be legal evidence of the registration.

New.

(5) No partnerships doing business contrary to the provisions of this Act shall begin or maintain an action upon or on account of any contracts made on transactions had with such partnership until the certificate prescribed by this section has been filed.

New.

[See section 10 B. Omitted from draft C for reasons stated in preliminary note to Part II, C.]

PART II.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THEM AS SUCH.

Section 6. [Partner Agent of the Firm as to Partnership Business.] Every partner is an agent of the firm for the purpose of the business of the partnership; and the acts of every partner who does any act, including the execution in the firm name of deeds of obligation or conveyance, for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

E. A. § 5.

Section 7. [Firm Bound by Act of Agent.] An act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner indicating an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners.

E. A. § 6. [Omitted from drafts B and C for reasons stated in preliminary note to Part III, C.]

Section 8. [Firm Not Bound by Acts of Partner Without the Scope of Firm Business.] Where one partner pledges the credit of the firm for a purpose not connected with the ordinary course of business of the kind carried on by the firm, the firm is not bound, unless he is in fact specially authorized by the other partners, or unless the other partners are estopped to deny such authority; but this section does not affect any personal liability incurred by an individual partner.

E. A. § 7.

Section 9. [Secret Restrictions Upon Power of Partner.] If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

E. A. § 8.

Section 10. [Firm Bound by Acts of Partner Committed Within Scope of Partnership Business.] Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

E. A. § 10.

Section 11. [Liabilty of Firm for Partner's Breach of Trust.] In the following cases; namely—

(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

E. A. § 11. (*a*).

(*b*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

E. A. § 11. (*b*).

Section 12. [Each Partner Answerable for Firm Liabilities.] Claims against a partnership shall be satisfied in the first instance so far as possible, out of the firm assets. If after the exhaustion of the firm assets the judgment against the firm remains unsatisfied in whole or in part, the firm creditor may enforce the joint and several liabilities of the partners, as contributories to the firm, to make good any deficiency of the firm assets.

If the plaintiff may lawfully attach the property of the firm before judgment against it, the plaintiff may also attach before such judgment the property of any one or more of the partners joined as contributories as a security for the payment of his or their contributory liability.

New.

Section 13. [One May Be Liable as a Partner by Estoppel.] (1) Every one who by words spoken or written or by conduct represents himself, or who knowingly sufferes himself to be represented as a partner in a particular firm, is liable as a contributory to the firm for the benefit of any one who has on the faith of any such representation given credit to the firm to the extent of the latter's claim remaining unsatisfied after the exhaustion of the firm assets liable to seizure on execution, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

E. A. § 14 (1), with some modifications.

(2) Provided that where, after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his estate or effects liable for any partnership debts contracted after his death.

E. A. § 14 (2), with slight verbal change.

Section 14. [Firm Bound by Admission of Partner.] An admission or representation made by a partner concerning the partnership affairs and in the ordinary course of its business or liquidation is evidence against the firm.

E. A. § 15, with addition of words "or liquidation."

Section 15. [Notice to Partner Is Notice to Firm.] Notice to a partner other than a special partner of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

E. A. § 16, with slight verbal change.

Section 16. [Liabilities of Incoming and Outgoing Partners.] (1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

E. A. § 17 (1).

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

E. A. § 17 (2).

(3) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

E. A. § 17 (3).

Section 17. [Revocation of Guaranty by Change in Firm.] A continuing guaranty given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

E. A. § 18.

Section 18. [Partner Exonerated From Future Liability by Renouncing Future Profits.] (1) A partner may exonerate himself from future liability to a third person on account of the partnership, but not from liability to his co-partners, by renouncing, in good faith, all participation in its future profits, and giving notice to such third person and to his co-partners that he has

made such renunciation, and that, so far as may be in his power, he dissolves the partnership and does not intend to be liable on account thereof for the future.

Based on *Karrick* v. *Hanneman*, 168 U. S. 32d, 334-5. Not in E. A.

(2) After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits, and his co-partners may proceed to dissolve the partnership.

Not in E. A.

PART III.

RELATION OF PARTNERS TO THE FIRM.

Section 19. [Relations Varied by General Consent.] The mutual rights and duties of the firm and the partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either expressed or inferred from a course of dealing.

E. A. § 19.

Section 20. [Partnership Property to Be Used For Firm Purposes.] All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

E. A. § 20.

Section 21. [Property Bought With Firm Money Is Partnership Property.] Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

E. A. § 21.

Section 22. [Nature of Partner's Interest.] A partner has no beneficial interest, legal or equitable, in any specific property whether real or personal belonging to the partnership, but only a right to receive in cash his proportion of the surplus of the firm

assets remaining after all claims of firm creditors have been satisfied.

Substituted for E. A. § 22.

Section 23. [Partner's Interest Subject to Charging Order.] (1) An attachment or execution shall not issue against partnership property except on a claim against the firm.

E. A. § 23 (1), slightly changed.

(2) The Court may, on the application of any judgment creditor of a partner, make an order charging that partner's interest in the partnership with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accuring), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been in favor of the judgment creditor by the partner, or which the circumstances of the case may require.

E. A. § 23 (2), slightly changed.

(3) The firm through the other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

E. A. § 23 (3).

Section 24. [Rules Determining Rights and Duties of Firms and Partners.] The interest of partners in the partnership and their rights and duties in relation to the partnership shall be determined, subject to any agreement expressed or implied between the partners, by the following rules:

The whole of section 24 is taken from E. A. § 24, with a slight change in sub-section 9.

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a*) In the ordinary and proper conduct of the business of the firm; or,

(*b*) In or about anything necessarily done for the preservation of the business or property of the firm.

(3) A partner making, for the purpose of the partnership, an actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the legal rate per annum from the date of the payment or advance.

(4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5) Every partner may take part in the management of the partnership business.

(6) No partner shall be entitled to remuneration for acting in the partnership business.

(7) No person may be introduced as a partner without the consent of all the existing members.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner shall, when he thinks fit, have access to and inspect and copy any of them either in person or by his representative.

Section 25. [No Expulsion of a Partner.] No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

E. A. § 25.

Section 26. [Termination of Partnership at Will.] (1) Where no fixed term has been agreed upon for the duration of the partnership, a partner may rightfully determine it at any time on giving notice in writing of his intention so to do to all the other partners.

E. A. § 26

Section 27. [Continuance of Partnership Beyond Fixed Term.] (1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

E. A. § 27 (1).

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership, but as a partnership at will.

E. A. § 27 (2), with slight verbal changes.

Section 28. [Duty of Partner to Render Accounts.] Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

E. A. § 28.

Section 29. [Partner Accountable as a Fiduciary.] (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction connected with the formation, conduct, dissolution or liquidation of the partnership or from any use by him of the partnership property, name or business connection.

E. A. § 29 (1), with slight verbal changes.

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by a surviving partner or by the representatives of the deceased partner.

E. A. § 29 (2).

Section 30. [Partner to Account for his Profits of a Rival Business.] If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

E. A. § 30.

Section 31. [Rights of Assignee of a Partner's Share.] (1) An assignment by a partner of his share in the partnership does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require an account of the partnership transactions or to inspect the partnership books, but merely entitles the assignee to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

E. A. § 31 (1), with slight verbal change.

(2) In case of a dissolution of the partnership as respects all the parties or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

E. A. § 31 (2).

PART IV.

DISSOLUTION OF PARTNERSHIP AND ITS CONSEQUENCES.

Section 32. [Dissolution by Lapse of Time or Notice.] Subject to agreement between the partners, a partnership is dissolved—

(*a*) If entered into for a fixed term, by the expiration of the term;

E. A. § 32 (*a*).

(*b*) If entered into for a particular undertaking, by the termination of that undertaking;

E. A. § 32 (*b*), with slight verbal change.

(*c*) If entered into for an undefined time, by any partner giving notice in writng to the other or others of his intention to dissolve the partnership.

In the last mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

E. A. § 32 (*c*).

Section 33. [Dissolution by Death, Bankruptcy or Charge.] (1) Subject to agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

E. A. § 33 (1).

(2) A partnership may, at the option of the other partners, be dissolved if a partner assigns his interest in the partnership or suffers it to be charged for his separate debt.

E. A. § 33 (2), with addition as to assignment of his interest.

Section 34. [Dissolution by Illegality of the Partnership.] A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

E. A. § 34.

Section 35. [Dissolution by Decree of Court.] On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a*) When a partner has been found lunatic by inquistion, or is shown to the satisfaction of the Court to be of unsound mind, in either of which cases the application may be made either

on behalf of that partner by his committee or next friend or person having title to intervene or by any other partner;

E. A § 35 (*a*).

(*b*) When a partner, other than the partner suing, becomes in any way incapable of performing his part of the partnership contract;

E. A. § 35 (*b*), with omission of word "permanently."

(*c*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated prejudicially to affect the carrying on of the business;

E. A. § 35 (*c*).

(*d*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him;

E. A. § 35 (*d*).

(*e*) When the business of the partnership can only be carried on at a loss;

E. A. § 35 (*e*).

(*f*) Whenever circumstances have arisen, which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

E. A. § 35 (*f*).

Section 36. [Notice or Knowledge of Dissolution Essential as to Third Persons.] (1) Where a person deals with a firm after a change in its membership he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

E. A. § 36 (1).

(2) Persons who have had business relations with a firm by which a credit is extended upon the faith of the partnership

must have actual knowledge or special notice equivalent to knowledge of the termination of the partnership.

Not in E. A.

(3) An advertisement in a newspaper of the place (or of each place, if more than one) in which at the time of dissolution the partnership business was carried on shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

E. A. § 36 (2), in substance.

(4) If the fact of dissolution is notorious in the community in which a person, who had not dealings with the firm before the dissolution, is engaged in business, he cannot charge a retired partner, although the dissolution was not advertised in a newspaper and although he was in fact ignorant of the dissolution.

Not in E. A. Based on *Lovejoy* v. *Spafford*, 93 U. S. 430.

(5) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner and not having been an active partner retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

E. A. § 36 (3), with a modification by adding the words "and not having been an active partner." This addition is based upon *Elmira Co.* v. *Harris*, 124 N. Y. 280.

Section 37. [Right of Partners to Notify Dissolution.] On the dissolution of a partnership or retirement of a partner, any partner may publicy notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

E. A. § 37.

Section 38. [Continuing Authority of Partners for Purpose of Winding Up.]. After the dissolution of a partnership the authority of each partner to bind the firm and the other rights and obligations of the partners, continue notwithstanding the

dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

E. A. § 38.

Section 39. [Rights of Partners as to Application of Partnership Property.] On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

E. A. § 39.

Section 40. [Apportionment of Premium Where Partnership Prematurely Dissolved.] Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term, otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium; or

(*b*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

A. U. F. § 40, take from E. A. § 40.

Section 41. [Rights Where Partnership Dissolved For Fraud or Misrepresentation.] Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him; and is

(*b*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities; and

(*c*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

A. U. F. § 41, take from E. A. § 41. [Omitted from drafts B and C, for reasons stated in preliminary note to Part V, C.]

Section 42. [Right of Outgoing Partner to Share Profits After Dissolution.] (1) Where any member of a firm has died or otherwise lawfully ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the legal rate per annum on the amount of his share of the partnership assets.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is

duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in the exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

A. U. F. § 42, take from E. A. § 42.

Section 43. [Retiring or Deceased Partner's Share to be a Debt.] Subject to any agreement between the partners, the amount due from the continuing firm to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

E. A. § 43.

Section 44. [Rules for Distribution of Assets or Final Settlement of Accounts.] In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

The assets of the firm shall be applied in the following manner and order:

(1) In paying the debts and liabilities of the firm to persons who are not partners therein;

(2) In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital;

(3) In paying to each partner ratably what is due from the firm to him in respect of capital;

(4) If the firm assets are less than the foregoing three classes of firm liabilities, the difference shall be supplied, if possible, by enforcng the respective obligations of the partners to contribute to the firm the amount of the deficiency of the firm assets. This claim of the firm against the partners shall rank equally with the claims of other persons against them. And the amount of these contributions shall be distributed in the same manner and order as the firm assets.

(5) If the firm assets exceed the amount of the aforesaid three classes of firm liabilities, the excess shall be divided among the partners in the proportion in which, by their agreement, the profits are divisible; if there is no such agreement, the excess shall be divided among them equally.

PART V.

LIMITED PARTNERSHIP.

PART VI.

INTERPRETATION.

Section 56. [Definitions of "Court' and "Business."] In this Act, unless the contrary intention appears,—

The expression "court" includes every court and judge having jurisdiction in the case;

The expression "business" includes every trade, occupation or profession.

Section 57. [Rule For Cases Not Provided for in Act.] In any case not provided for in this act, the rules of law and equity, including the law merchant, shall govern.

Section 58. [Interpretation in Favor of Uniformity.] This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

Section 59. [Liberal Construction and Substantial Compliance.] This Act shall be liberally construed and a substantial compliance with its terms shall not render a special partner liable as a general partner.

Section 60. [Act Does Not Apply to Existing Partnerships.] The provisions of this act do not apply to partnerships formed prior to the taking effect thereof.

Section 61. [Inconsistent Legislation Repealed.] All acts or parts of acts inconsistent with this Act are hereby repealed.

Section 62. [Time When Act Takes Effect.] This Act shall take effect on the day of one thousand nine hundred and

Section 63. [Name of Act.] This Act may be cited as the Uniform Partnership Act.

APPENDIX.

Act of 53 & 54 Victoria, Chapter 39 [August 14, 1890].

An Act to Declare and Amend the Law of Partnership.

Nature of Partnership.

1.—(1.) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2.) But the relation between members of any company or association which is—

(*a.*) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or

(*b.*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(*c.*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act.

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a.*) The receipt by a person of a debt or other liquidated amount by installments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(*b.*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(*c.*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(*d.*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(*e.*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth has been satisfied.

4.—(1.) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

(2.) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members.

Relations of Partners to persons dealing with them.

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for the carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule or law relating to the execution of deeds or negotiable instruments.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorized by the other partners; but this section does not affect any personal liability incurred by an individual partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

11. In the following cases; namely—

(*a.*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b.*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein:

Provided as follows:—

(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

14.—(1.) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2.) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators' estate or effects liable for any partnership debts contracted after his death.

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

17.—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3.) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

Relations of Partners to one another.

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

20.—(1.) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2.) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3.) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or movable and not real or heritable estate.

23.—(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2.) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4.) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5.) This section shall not apply to Scotland.

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a.*) In the ordinary and proper conduct of the business of the firm; or,

(*b.*) In or about anything necessarily done for the preservation of the business or property of the firm.

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5.) Every partner may take part in the management of the partnership business.

(6.) No partner shall be entitled to remuneration for acting in the partnership business.

(7.) No person may be introduced as a partner without the consent of all existing partners.

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

26.—(1.) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2.) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

27.—(1.) Where a partnership, entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2.) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

29.—(1.) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion.

(2.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner. and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Dissolution of Partnership, and its consequences.

32. Subject to any agreement between the partners, a partnership is dissolved—

(*a.*) If entered into for a fixed term, by the expiration of that term:

(*b.*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(*c.*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

33.—(1.) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

35. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a.*) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner:

(*b.*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract:

(*c.*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business:

(*d.*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him:

(*e.*) When the business of the partnership can only be carried on at a loss:

(*f.*) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

36.—(1.) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2.) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as

to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3.) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term, otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a.*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium; or

(*b.*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a.*) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him; and is

(*b.*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities; and

(*c.*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

42.—(1.) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2.) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partners in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

(*a.*) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(*b.*) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:
2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital:
3. In paying to each partner ratably what is due from the firm to him in respect to capital:
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

45. In this Act, unless the contrary intention appears,—

The expression "court" includes every court and judge having jurisdiction in the case:

The expression "business" includes every trade, occupation, or profession.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

47.—(1.) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy

(Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum.

(2.) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

49. This Act shall come into operation on the first day of January, one thousand eight hundred and ninety-one.

50. This Act may be cited as the Partnership Act, 1890.

DRAFT OF AN ACT TO MAKE UNIFORM THE LAW OF PARTNERSHIP

LETTER OF TRANSMISSAL.

PHILADELPHIA, July 1, 1911.

Mr. Talcott H. Russell, Chairman of the Committee on Commercial Law.

DEAR SIR:

On February 4th last your Committee at a meeting held in Philadelphia adopted the following resolution:

"Resolved that Doctor Lewis be requested to prepare a draft of the Partnership Act upon the so-called common law theory, and to print the same for the use of the Committee in such a way that, so far as it contains changes in existing law, such changes shall be indicated by using a different kind of type; and that so far as the matter in the draft pertains to the method of legal proceedings, such portion be printed at the end of the draft."

The draft of a Partnership Act, to be known as draft D, submitted herewith, has been prepared in accordance with this resolution, Mr. James B. Lichtenberger acting with me as in the preparation of drafts B and C.

Very truly yours,

WM. DRAPER LEWIS.

A DRAFT

[To be known as Draft D]

OF AN

ACT TO MAKE UNIFORM THE LAW OF PARTNERSHIP.

[Where the draftsmen intend to effect a change in the existing law the fact is indicated by printing the provision in italics, where the present law is uncertain or different rules prevail in different jurisdictions, the fact is indicated in the notes.]

KEY TO LETTERS IN NOTES.

A. The last draft submitted by Mr. James B. Ames.

C. The first draft on the aggregate theory submitted by the present draftsmen.

E. The English Partnership Act.

PART I.

PRELIMINARY PROVISIONS.

Part I of the present draft corresponds to the concluding sections of the English Act. It has been transferred from the concluding to the preliminary part of the Act in conformity with the ideas of the modern school of statutory draftsmen. [Cal. C. C. sections 2-21; Idaho Rev. Codes (1909) sections 1-20; 1 Code of Ala. (1907) sections 1-13; Pub. Stat. of Ver. (1906) sections 1-37; Limited Partnership Act (1907); L. R. 45 Stat. 110 (Eng.); Summary Jurisdiction Act (Scotland) (1908); L. J. R. 88 Stat. 406 (Eng.); Code of Tenn. (1896) 121; 2 S. Dak. Comp. Laws (1908), 316, 318; Cobbey's Neb. Stat. (1907) 111.]

Section 1. [Name of Act.] This Act may be cited for all purposes as the Uniform Partnership Act.

Corresponding section 50 E.

Section 2. [When Act Takes Effect.] This Act shall take effect on the day of one thousand nine hundred and .

Corresponding section 49 E.

This section differs from the English section in the use of "take effect" instead of "come into operation." The words "at twelve o'clock noon" of draft C have been omitted in this draft because of the discussion of the section at the Philadelphia meeting of the Committee, when it was pointed out that the use of such words in other acts had lead to a confusion as to the standard of time on which the reckoning should be made.

Section 3. [Legislation Repealed.] All acts or parts of acts inconsistent with this Act are hereby repealed.

Corresponding section 48 E.

The schedule of repealed acts, employed in the English Act and referred to in draft C, has been omitted because of the objections raised to it at the Philadelphia meeting of the Committee, on the ground that such a clause would be improper in most of the States. The location of this section in the preliminary chapter of the Act has support of authority. [Idaho Revised Codes, 1909, sections 17-19; Summary Jurisdiction Act (Scotland) 1908, L. J. R. 88 Statutes 406 (Eng.); section 3; 1 Ala. Code, 1907, section 10; Cal. Civ. Code, section 20.]

Section 4. [Definition of Terms.] In this Act, "Court" includes every Court and Judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankrupt Act or insolvent under any State Insolvent Act.

Corresponding section 45 E.
The definition of "Court" is that of the English Act.
The definition of the word "business" is that of the English Act.
The definition of "person" is added to prevent repetitions in the Act.
In England it is unnecessary to define the word "bankrupt." In the United States the State insolvent laws at times, or under special circumstances, may apply. "Bankrupt" is defined to cover these contingencies. [Beale's Parsons, sections 366-369.]
The words "unless the contrary intention appears," found in the introductory sentence of the English Act and draft C are omitted because the draftsmen have refrained, throughout this draft, from using the words defined in this section in any other than the sense in which they are here defined.

Section 5. [Interpretation of Knowledge and Notice.] (1) A person has "knowledge" of a fact, within the meaning of this Act, when he has

(*a*) Actual knowledge, or

(*b*) Knowledge of other facts from which an ordinarily prudent man would obtain knowledge.

(2) A person has "notice" of a fact within the meaning of this Act when the person who claims the benefit of the notice, or some one on his behalf,

(*a*) States the fact to such person, or

(*b*) Delivers, by mail or other means of communication, a written statement of the fact to such person or to a proper person at his place of business or at his residence, if the person claiming the benefit has no knowledge of the place of business. Provided, however, that delivery of the statement in the ordinary course by the postal authorities shall be sufficient delivery.

No corresponding section in the English Act.
As it is necessary to employ these words in several sections of the Act, and as much confusion now exists in the use of the words "notice" and "knowledge" in our law, a section indicating the way in which the words are here used seems desirable. In draft C notice was defined in section 39 (4). The suggestion that the provision be transferred to the Preliminary Provisions met with the unanimous approval of the Committee. In the section as redrawn an attempt is made to carry out the idea that the word "notice"

should designate definite things which if proved to have been done, enable the person claiming the benefit to assert that notice has been had, irrespective of whether the person charged has had knowledge or not. We believe that by adhering strictly to this conception throughout the Act, the things which a person must do in order to be confident that he can claim the benefit of "notice" are made plain. We are also able to indicate accurately when "knowledge" as distinguished from "notice" must be had.

As stated the present law in regard to "notice" is in considerable confusion. Under our case law, as a rule, in ordinary transactions, except those which relate to commercial paper, no one has had "notice" until he has "knowledge;" though, of course, "notice" to an agent is notice to a principal. Whether the delivery of a letter containing a "statement of a fact" would or would not be sufficient if the addressee did not read the letter is doubtful. The Court might well hold that the addressee, by his neglect to read the statement, was estopped from denying that he had "notice." The change in the law, if it is a change, which the present section as now drawn affects, is, we believe, in the right direction. The section does not go to the extent of saying that the mere deposit of a "written statement of the fact" in the mail is enough to charge the addressee with "notice;" but it does go to the extent of declaring that if such written statement is received at the place of business of the addressee or, in certain cases, at his residence, in the usual way, the addressor and his agents, having done all that was reaonably possible to do to give the addressee "knowledge," should have the benefit of his diligence. The addressor by selecting the postoffice, telegraph, or other public service corporation as the method by which the letter shall be transferred, makes them his agents, not the agents of the addressee.

The section as drawn, in dealing with the character of the "statement of fact," where the statement is not a verbal statement merely requires a "written statement." The omission of the word "printed" is after deliberation. To insert the word "printed" might raise a doubt as to the effect of the delivery of a newspaper containing a "statement of the fact." There ought to be no doubt that this is an insufficient statement. Unquestionably, such delivery is not a delivery of a "written statement of the fact;" but, on the other hand, if a printed or typewritten statement of the fact—as the dissolution of the partnership—is made on a separate card which is enclosed in an envelope and given to the addressee, there would appear to be no doubt that any Court would hold that "a written statement of the fact" had been delivered to such person. The principle is clear. Nothing should be regarded as "a written statement of the fact" which is not so prepared as to cause the one to whom it is addressed, as a reasonably prudent man, to read it. An exact definition of the character of the statement which is to be made is practically impossible; neither do we believe it to be desirable. The words we have employed, "written statement of the fact," do not preclude the statement from being typewritten or printed, but they do emphasize—that which it is necessary to emphasize—that the statement must be a separate statement of the fact made to the addressee, and not a general statement for all the world to read or not as fancy dictates.

The notes to section 6, *infra*, in regard to "estoppel" and "agency" will perhaps answer some questions which may arise in connections with the present section.

Section 6. [Rules of Construction.] (1) The rule of the Common Law, that statutes in derrogation thereof are to be construed strictly, has no application to this Act.

No corresponding provision in the English Act.

This provision is customary in American Codes [Cal. C. C. section 4; 1 Ala. Code (1907), section 12; 1 Idaho Rev. Codes, section 4]. Although there is hardly any change from existing law in the present Act, where the existing partnership law is uniform, as the existing law is far from uniform throughout the United States, the adoption of the Act will necessarily effect some changes in each State; therefore, the insertion of the present provision.

(2) The doctrine of estoppel shall continue applicable as heretofore.

No corresponding provision in the English Act. The provision is new to this draft.

The necessity for this paragraph is illustrated in the provisions relating to "notice," section 5 (2) *supra*. A "written statement" may be delivered in such a way as to induce the person to whom it is delivered to abstain from reading it. No one who has thus delivered a written statement should be permitted to claim the benefit of the notice. This result might be attained by inserting after the word "delivered," section 5 (2a) *supra*, the words, "in good faith;" but these words do not guard against the person having delivered a written notice in good faith, subsequently changing his mind, and in bad faith re-acquiring the writing before it is read.

This paragraph, applying to the whole Act, obviates the necessity of constant repetition of the principle. For instance, section 7 of the English Act deals with the pledging, by one partner, of the credit of the partnership for a purpose apparently not connected with the partnership's ordinary course of business, and provides that the partnership is not bound unless he was authorized by the other partners. Mr. Ames in copying this section felt obliged to add the words "or unless the other partners are estopped to deny such authority" (section 8 A). The doctrine is, of course, applicable, not only to the sections referred to but to many other sections of the Act.

(3) The rules and principles of agency shall have full force and effect under the provisions of this Act.

No corresponding provision in the English Act. The provision is new to this draft.

This paragraph is inserted because it is important to emphasize the fact that the Act is a Partnership Act and not an Act relating to agency or any branch thereof. The draftsmen found in working over the question of "notice," that one of the causes of the present confused use of the word is due to the attempt to mix two distinct things: what is notice to a person of a fact, and how far notice to an agent is notice to a principal. The second question is wholly a question of the law of agency; the first has nothing to do with the law of agency. The first the draftsmen have attempted to deal with in section 5, *supra;* the second, is not a question within the scope of a Partnership Act.

This paragraph is also suggested in order to avoid constant reference to agents throughout the Act. For insance, in section 11, *infra*, we find a provision that a partner cannot bind the partnership where the person dealing with him had knowledge that the partner with whom he dealt had no authority to bind the partnership. The knowledge of an authorized agent of such person should, of course, be effectual when the person chose to deal through an agent. This provision in regard to the law of Agency avoids any possi-

bility of a different construction, and renders unnecessary the insertion of the words "or authorized agent" after the word "person" in the section referred to and other sections.

(4) This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those States which enact it.

No corresponding provision in the English Act.
The provision is common to the uniform acts.

(5) This Act shall not be construed so as to impair the obligations of any contract existing when the Act goes into effect, nor to effect any action or proceedings begun or right accrued before this Act takes effect.

No corresponding provision in the English Act.

The provision is based on the belief that the Act should apply equally and as soon as it takes effect to all partnerships, whether formed before or after such time. This, however, under our Federal and State Constitutions, requires the protection of existing rights.

The wording of this provision is based on the American Codes. [Idaho Rev. Codes, section 4; Cal. C. C. section 4; Rev. Stat. of Colo. (1908), sections 467, 468; Gen. Stat. of Kans. (1905), 1633; 1 Burns Anno. Ind. Stat. (1908), sections 240, 241, 1356, 1359; Cobbey's Rev. Stat. Neb. 11, 363; 2 S. Dak. Comp. Laws (1908), 313, 316, 318.]

Section 7. [Rules for Cases not Provided for in this Act.] In any case not provided for in this Act the rules of common law and equity, including the law merchant, shall govern.

Corresponding section 46 E.

The phraseology differs slightly from that employed in the English Act, following that suggested by Mr. Ames (section 57 A) with the insertion of the word "common" before the word "law."

PART II.

NATURE OF A PARTNERSHIP.

The arrangement of this Part follows the general arrangement of the English Act, sections 1-18 inclusive.

Mr. Ames in draft A inserted [section 3 A] a provision that a Profit-Receiving Lender or Seller resembles a Special Partner, and must be treated as a postponed creditor if the person or partnership to whom the money is loaned should be unable to pay all creditors, including such lender or seller, 100 cents on the dollar. The present draftsmen have omitted this provision. They believe that such a creditor, where he really is a creditor taking profits in lieu of interest and not a partner, should be treated as any other creditor. The provision that he should be treated, on the insolvency of the partnership, as a postponed creditor is foreign to the general American law, except in Pennsylvania, where it has been adopted in a modified form, only to cause confusion. [Act of April 6, 1870, P. L. 56; *Wessels* v. *Weiss*, 166 Pa. 490 (1895); *Jordan* v. *Patrick*, 207 Pa. 245 (1903); *Waverly* v. *Hall*, 150 Pa. 466 (1892); *Hart* v. *Kelly*, 83 Pa. 286 (1877); *Edwards* v. *Tracy*, 62 Pa. 374 (1869); *Walker* v. *Tupper*, 152 Pa. 1 (1892); Gibb's Estate, 157 Pa. 59 (1893).] In Georgia, sharing the profits creates a partnership. [*Buckner* v. *Lee*, 8 Ga. 285 (1850); *Perry* v. *Butt*, 14 Ga. 609 (1854); *Dalton* v. *Dalton*, 33 Ga. 243 (1862); *Dalton* v. *Hawes*, 37 Ga. 115 (1867); *Huguley* v. *Morris*, 65 Ga. 666 (1880); *Brandon* v. *Conner*, 117 Ga. 759 (1903).] In all other jurisdictions sharing profits is not a conclusive test of partnership and, where persons are not partners, a mere debtor and creditor relation arises. The claims of such persons are not postponed and any mortgage or other security which they may have taken is valid as in other cases. [See note in 18 L. R. A. (N. S.) 963, 1055 (1908).]

Aside from the fact that section 3 A differs from the present law, there are two objections to its present insertion. Where the loan is to a partnership, then it may be proper to postpone such lender to all the other creditors of the partnership; but where the loan is to a sole-trader, under 3 A such lender would be postponed, not only to all the other creditors of that particular business, but also to all other creditors of such person. It thus would happen that, when the loan is made to a sole-trader, the lender could recover nothing in respect of his loan so long as there were any other outstanding claims against his debtor. Section 3 A would, therefore, if adopted, destroy the value of such loans. This result could be avoided by taking a mortgage or other security but for the clause in 3 A against such action. The second objection is that it is possible that by invalidating mortgages given for such loans, a doubt might be thrown on the value of all mortgages. The purchaser of a mortgage would, at least, have to demand positive proof that it was not given to secure a loan for a share of the profits of a business in lieu of interest.

Section 8. [Partnership Defined.] (1) A partnership or firm is an association composed of two or more persons formed for the purpose of carrying on, as co-owners, a business with a view to profit.

(2) But any association formed under the provisions of any other statute of this State is not a partnership under the provisions of this Act unless so declared by that statute, and nothing in this section shall be construed to make an association formed under a statute of another State, the United States, or foreign country a partnership under this Act, unless such association would have been a partnership in this State prior to the adoption of this Act.

The words "or firm" and "for the purpose of" are new to this draft.

The English Act defines, section 1 (1), partnership, as "the relation which subsists between persons carrying on a business in common with a view to profit." The other paragraphs of the section in the English Act excepts associations formed under various statutes. Section 4 (1) of the English Act provides: "Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name."

An examination of the definition of partnership here submitted falls under two heads: An explanation of the reason for the words employed in the definition, and the use of the words "partnership" and "firm."

Explanation of the Reason for the Words Employed in the Definition.

We have several kinds of business associations; partnerships, limited partnerships, corporations, etc. These differ from each other in the nature of the relations which subsist between the members. The relations which subsist between the members of a business association effect the rights of third persons who have dealt with the members or their agents. The subject-matter, therefore, of any legislation dealing with any business association, is not only the relations which subsist between the members, but the effect of those relations on the rights of other persons. When we speak of the law of private corporations we mean that body of law which grows out of the relations which subsist between the members of a particular kind of business association, and the effect of those relations on the rights of others. With this particular association we also include the rights of the State growing out of the special privileges conferred upon the members. The Partnership Act has, in relation to another and different association, the same scope, except that the association, having no special privileges from the State, has no special relation thereto. It would appear desirable then, that immediately after the preliminary sections, the association which is the subject of the Act, should be defined.

The first inquiry is, why say a partnership is "an association composed *of two or more persons*"? In view of the fact that the word "association" itself implies the acting together of two or more persons, why not merely say that a partnership is an association formed for the purpose of carrying on business in which the members are co-owners of the business? The word person includes, as stated in section 4, *supra*, "individuals, partnerships, corporations, and other associations." The definition as worded thus asserts, what would be doubtful if the words "of two or more persons" were omitted, namely, that any one of these associations may become members of a partnership. It is true that if two or more corporations attempt to form a partnership the contract may be *ultra vires* as to both (*Boynd* v. *American Carbon Block Co.*, 182 Pa. 206); but the capacity of corporations to contract

is a question of corporation law. Under the present law it appears that a partnership can, as such, be a member of another partnership, if that was the intent of the parties. [*Raymond* v. *Pulman*, 44 N. H. 160; *Cheap* v. *Crammond*, 4 Barn. & Ald. 663; *in re* Hamilton, 1 Fed. 800; *Riddle* v. *Whitehill*, 135 U. S. 621.]

The words "formed for the purpose of" are inserted to remove any doubt in the following case: A and B sign partnership articles and make their agreed contributions to the common fund. A refuses to carry on business as agreed. Is there a partnership to be wound up in accordance with the provisions of Part VI, *infra?* The words quoted require an affirmative answer to this question.

The definition asserts that the associates are "co-owners" of the business. This distinguishes a partnership from an agency—an association of principal and agent. A business is a series of acts directed toward an end. Ownership involves the power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control.

Lastly, the definition asserts that the associates carry on a "business with a view to profit." Partnership is a branch of our commercial law; it has developed in connection with a particular business association, and it is, therefore, essential that the operation of the Act should be confined to associations organized and carried on for profit.

In view of the many definitions of a partnership which have been proposed, the draftsmen desire to note the reasons for the omission of certain ideas expressed in some of the definitions cited by Lindley. (Partnership, pp. 11, 12.)

They have not indicated that the association must be a voluntary one. In the domain of private law the term association necessarily involves the idea that the association is voluntary. To say that the association must be created by contract, is not only unnecessary, but in view of the varied use of the word "contract" in our law, if the word is used an explanation would have to be made as to whether the contract could be implied, and if so, whether it could be implied in law or only implied as a fact. By merely saying that it is an association these difficulties are avoided.

Again, it is not said that the business must be a lawful business. The draftsmen believe that the effect of the unlawfulness of the business should be dealt with under dissolution. Section 36 (3) *infra*, provides that dissolution is produced "by the happening of any event which makes it unlawful for the business of the partnership to be carried on, or for the members to carry it on in partnership." If the business is wholly unlawful, then the partnership is dissolved the moment it is created. The omission of the word "lawful" in the definition does not prevent this result. Very often, however, a business may be in part lawful and in part unlawful. Hotel-keepers may run a "dive." Placing the word "lawful" before the word business in the definition would tend to throw a doubt on the propriety of the orderly winding up of such a business as a partnership, a result which would be, it is submitted, unfortunate.

In regard to the wording of paragraph (2): The reason for not following the English Act and attempting to enumerate the associations which are excluded because formed under special statute, is because such an enumeration is unnecessary, and because the paragraph would have to be differently worded for each State. For instance, in draft 1 (2) A, it was provided: "But a joint stock association, whether incorporated or unincorporated, whose members are fluctuating by reason of the transferability of their shares, and whose business is also managed by a board of directors, committee or individual officer, is not a partnership within the provisions of this Act." It was found on examination, that under such a provision,

associations formed without the provisions of any statute and which should fall under the Act would be excluded, while, on the other hand, certain other associations formed under other statutes, as, for example, some associations formed under the Registered Partnership Act of 1899, of Pennsylvania, would be improperly included within the Act. Under the wording of the present draft, if the association falls within the wording of the first paragraph of the section, and is not organized under any statute, then it is a partnership and subject to the provisions of this Act. The last part of paragraph (2) is new to this draft. They have been inserted to emphasize the fact that it is not intended to affect the legal status in the state of foreign associations.

Use of the Words Partnership and Firm.

The drafter of a Partnership Act is embarassed by finding the association with which he has to deal called by two names. This is a difficulty that does not confront a draftsman of a Corporation Act; it does not confront those dealing with the analogous association under the civil law. The *société en nom collectif*, the civil law partnership, is not known in any one country by two names.

The question naturally will be asked: "Why not distinguish between 'partnership' and 'firm' in the manner of the English Act?"

From the sections of that Act quoted, *supra*, it appears that it was the intention of the draftsmen of the English Act to use the word "partnership" to indicate the sum of the relations between the partners, and the word "firm" to indicate the association or the persons associated considered collectively and as acting together.

It would seem that, as the Act deals with more than the relations *inter se* of the partners, if the word "partnership" expresses merely those relations, the first section of the Act should define the association, as the firm, and the Act itself be known as "The Firm Act." This criticism, however, goes merely to form.

If the text of the English Act is taken and where the word "partnership" is used the definition of partnership as given in section 1, substituted, extraordinary results are often reached. Take section 5. "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership." Insert for the word "partnership" and "firm" the definitions in sections 1 and 4 (1), and the section reads: "Every partner is an agent of the partners collectively and his other partners for the purposes of the business of the relation which subsists between the partners, *i. e.*, the persons carrying on the business in common with a view to profit." Two things are at once obvious. First, the words "his other partners" are unnecessary. Their only effect is to suggest the idea that the liability of the partners is joint and several, which so far as England is concerned, was not the intention of the draftsmen. (See section 9.) Second, the draftsmen in this fifth section are not using the word "partnership" as defined in section 1; they are using the word "partnership" as business men use it, as a name for the association, and in the sense in which they have defined the word "firm" in section 4 (1). If section 5 read: "Every partner is an agent of the firm, for the purpose of the business of the firm," the words would have accurately expressed the meaning intended.

A further examination of the English Act shows that in thirty-three instances beside the one given to read the word partnership as that word is defined in section 1 of the Act, produces unintelligible results. For instance, the Act constantly speaks of "partnership business," sections 14 (2), 16, 24 (5), (6), (8), 31 (1), 35 (*d*); of "partnership affairs," sections 15, 16, 31 (1); of "partnership transactions," section 31 (1); of "partnership property," sections 20 (3), 22, 23 (2), 24; of "partnership stock," section 20 (1); of

"partnership books," sections 24 (9), 31 (1); of "partnership assets," sections 31 (2), 41 (*a*), 42 (1); of "partnership debts or obligations," section 17 (2), and of "partnership liability," sections 41 (*a*) and 41 (*b*). Now it is manifest that while the partners collectively can have such things as affairs, assets, and liabilities, the relation which subsist between persons carrying on business in common cannot have them; and, therefore, it is also manifest that by partnership in these sections the draftsmen meant the association.

So also the Act speaks of money coming to the partner in respect to the partnership, section 23 (2). Money cannot come in respect to a relation which subsists. Again, section 24 speaks of "rights and duties in relation to the partnership." A "right or duty in relation to a relation which subsists," is without meaning. In similar fashion other expressions used in the Act may be criticized, such as "every partner making for the purpose of the partnership," section 24 (3); "books are to be kept at the place of business of the partnership," section 24 (*a*); "every partner must account for any benefits received. * * * from any transactions concerning the partnership," section 29 (1); "share in the partnership," sections 31 (1), 41 (*a*); "business of the partnership," section 35 (*e*); and "rules of common law and equity applicable to partnership," section 41. It is clear in all these cases that the draftsmen had in their minds when they used the word, not merely the relation subsisting between the partners, but the partners collectively as associated in carrying on the business; that is, the partnership or firm in the sense that those words would be used by ordinary business men.

While pointing out that in a great number of instances, if the definition of partnership which is found in the English Act is substituted for the word partnership unintelligible results are produced, it is fair also to indicate that there are a number of sections in which the definition of partnership in section 1 can be applied without violating the meaning intended by the draftsmen. These, however, are practically all sections which relate to the formation, duration and dissolution of the association. When the association is formed the relation which subsists between the partners is created; when it is dissolved the relation is changed and finally dissolved. Thus, such expressions as "duration of," or "during the partnership," sections 26 (1), 31 (2), 40, may be read "duration of the relation which subsists between the persons carrying on business in common," without doing violence to the meaning intended. The same may also be said of the expressions "determine the partnership," section 26 (1); "where the partnership has been originally constituted," section 26 (2); "where a partnership entered into for a fixed term," section 27 (1); "partnership has been or is dissolved," sections 29 (2), 32, 33 (1), 33 (2), 34, 40 (*b*); "dissolve the partnership," sections 32 (*c*), 35, 38, 39, 44. In all these cases, however, these sections would mean the same thing if the word partnership was read as designating the association, rather than merely the relation which subsists between partners. Indeed, there is no reason to suppose that the draftsmen in using the word partnership in these sections, had not in their mind the association. It is apparently only an accident which makes the sentence still read as intended if we substitute for the word "partnership" the definition of partnership as given in section 1. That it is the association, and not merely the relation which subsists between partners, which is always in the minds of the draftsmen of the English Act, is clear from several of the sections just referred to. For instance, section 32 reads: "Subject to any agreement between the partners, a partnership is dissolved." The use of the article "a" is natural if the draftsmen were thinking of the association. If the relation which subsists between the partners is the only thing which was considered when the section was written, it would have been natural for the draftsmen to have used the article "the." See also sections 38, 39, where again the dissolution of "a" partnership instead of "the" partnership is

spoken of, and section 40 where the expression "entering into 'a'," not "entering into 'the'" partnership is used.

There are only two places where the word "partnership" is used in the English Act, where the section reads more clearly if for the word "partnership" is substituted the "relation which subsists between the partners" rather than "association." In sections 35 (*b*), 41, 42 (2), the expression "partnership contract" is found, and in section 35 (*d*) the expression "partnership agreement." In these sections the contract or agreement between the partners, not a contract between the partners and third persons, is intended; in short, the contract or agreement which relates to the relations subsisting between the partners. If the word "partnership" is used to designate the association, while it might be possible to distinguish the contract *inter se* from a contract with third persons by speaking of the former as "the partnership contract," and the latter as "a partnership contract," it would be clearer to refer to the former as "the contract between the partners" and the latter as "the contract of the partnership."

All the sections in which the word "partnership" is used in the English Act have been here referred to except the second use of the word in section 35 (*d*), where the expression "carry on business in partnership with them" is used, an expression which is perhaps correct, whether we use the word partnership as defined in section 1, or as indicating the association, but is much more smooth if the word partnership is translated as association.

The examination just made of the English Act, not only indicates that the word partnership in that Act has not been used as it is defined in section 1, but that there is no necessity in a Partnership Act for a word which indicates the sum of the relations which exists between partners, rather than the association, *i. e.*, the persons considered collectively who have those relations, and also relations to third persons. To introduce into the Act a word for which, as defined, there is no use, may not do serious harm, but it certainly does not tend either to charity of thought or scientific draftsmanship.

If there are two names, by which this association is called in common speech, it would appear the part of wisdom to select the one in most common use, which is the one which corresponds to the name of the Act, and to use that exclusively. As, however, it is impossible to expect, even if it were desirable, that business men will cease speaking of the association on many occasions as a firm, and as judges are bound more or less to follow this custom in writing opinions, the draftsmen think that in the definition of partnership the fact that a partnership and a firm mean exactly the same thing should be clearly indicated, so that any one speaking of the provisions of the Act may substitute the word "firm" for "partnership" without effecting the meaning.

As the words "partnership" and "firm" are identical, throughout these notes, where the only difference in the wording of a section in this draft and the wording in the English Act is the use of the word "partnership," instead of the word "firm," the sections are referred to as identical.

Section 9. [Rules for Determining the Existence of a Partnership.] In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Except as expressly provided by section 19 of this Act, persons who are not partners as to each other are not partners as to third persons.

No corresponding provision in the **English Act.**

(2) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

Identical with 2 (1) E.

(3) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

Identical with 2 (2) E.

(4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular:

(*a*) The receipt by a person of a debt or other liquidated amount by installments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

Identical with 2 (3a) E.

(*b*) A contract for the renumeration of an employee or agent or landlord of a person engaged in a business by a share of the profits of the business does not of itself make the employee or agent or landlord a partner in the business or liable as such;

Identical with 2 (3b) E, except that the words "employee, or agent, or landlord" are employed instead of "servant or agent."

(*c*) A person being the legal representative, widow, or legatee of a deceased partner, and having, by a way of annuity or otherwise, a portion of the profits made in the business in which the deceased person was a partner, is not by reason

only of such receipt a partner in the business or liable as such;

Identical with 2 (3c) E, except that "legatee" is employed instead of "child."

(*d*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such.

Identical with 2 (3d) E, except that the proviso in the English Act that "the contract is in writing, and signed by or on behalf of all of the parties thereto," is omitted.

(*e*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the good-will of a business or other property is not, by reason only of such receipt, a partner in the business or liable as such.

Identical with 2 (3e) E, except that "or other property" is included. If a sale of a good-will in consideration of a share of profits does not create a partnership, then the sale of other property in the same manner should not do so. This is the present law. [18 L. R. A. N. S. (Note) 1041 (1908).]

Section 10. [Partnership Property.] (1) All property and rights and interests in property originally brought into the partnership stock or subsequently acquired, whether by purchase or otherwise, on account of the partnership or for the purpose and in the course of the partnership business is partnership property.

Identical with 20 (1) E, except that the English Act employs the expression "are called in this Act partnership property."

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

Corresponding section 21 E.

The corresponding section reads: "Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm."

The incorporation of this provision and the next into the forepart of the Act is in accordance with the arrangement of our Codes [Cal. C. Code, section 2401, Saunder's Rev. C. C., of La., section 2808.] It would seem properly to belong in this part of the Act because of the fact that third persons are concerned as to what is partnership property.

(3) The partnership may take and hold in fee simple or for any less estate, real estate or interests therein, in the partnership name, and the same shall be as valid and effectual in law and equity as if the same were in the individual names of all the partners. Where the title is so taken in the partnership name, it can be mortgaged, encumbered, leased, or conveyed in the partnership name only.

No corresponding provisions in the English Act.

This provision is based upon the Pennsylvania statute regulating Registered Partnerships (Act May 9, 1899, P. L. 261, section 9). Its purpose is to do away with the present confusion as to the holding of real estate and the effect of a deed of conveyance in the partnership name. Partners under this draft, are co-owners of partnership property (see section 34, *infra*). The paragraph as drawn does not do away with present methods of conveyancing. It merely provides for an additional, and, it is submitted, more convenient method of transferring title to real property by or to a partnership in the ordinary course of partnership business. The method may or may not be used at the option of the partners. The partners would be the grantors though one partner might sign the partnership's name to the deed without the knowledge of his co-partners. The partner so signing the partnership name to the deed would act, as in the case of personal property. as the agent of his co-partners.

How far a conveyance in the partnership name, if in excess of the authority of a partner, deprives the partnership of its interest in the property is dealt with under section 11 (2), *infra*.

The persons present at the Philadelphia meeting of the Committee were generally favorable to the objects of this section. There was some question as to the exact wording of the first two lines, it being suggested that the expression "in fee simple or for any less estate, real estate or interest therein" was awkward, and that the same idea could be expressed with the use of fewer words. The draftsmen believe, on consideration, that the language should not be altered. The words "in fee simple or for any less estate" indicate the *quantum* of the estate which may be held in the partnership name, while the words "real estate or interest therein," designate the character of the things which may be held in the partnership name, and indicates that, not merely land, but all incorporeal hereditaments are included. To use, instead of the expression as a whole, the words "real estate," would create a doubt as to whether incorporeal hereditaments were or were not included. To use the expression "real estate or interests therein," omitting the words "in fee simple or for less estate," might be sufficient, but it is believed that it is best to let the sentence remain as originally drafted, thereby avoiding any possibility of omitting something which is intended to be included.

PART III.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP.

The sections in this Part correspond to sections 5-18 of the English Act. The arrangement adopted in the present draft is the result of a desire to treat first, the different Acts which bind the partnership; then the liability resulting from those Acts. Fraudulent conveyances and guaranties, not belonging to either of these groups, are considered in the concluding sections.

Section 6 of the English Act is omitted. The section provides: "An Act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm, by a person thereto authorized, whether a partner or not, is binding on the firm and all the partners." There is also a proviso preventing the section affecting "any general rule or law relating to the execution of deeds or negotiable instruments." In as far as this section deals with agents not partners, the provisions would appear to have no place in a Partnership Act, and in as far as it deals with partners, the provisions are unnecessary in view of the provisions of section 11, *infra*.

Section 17 (2) of the English Act, which provides that a partner retiring from a partnership does not cease to be liable for partnership debts or obligations, is omitted from this Part of the Act. The provision appears in Part V, *infra*. [See 43 (1)], which treats of dissolution and its results, because under the present draft, the retirement of any partner produces dissolution.

Section 11. [Partner Agent of Partnership as to Partnership Business.] (1) Every partner is an agent of the partnership for the purpose of the business of the partnership and the acts of every partner who does any act, including the execution in the partnership name of deeds of obligation or conveyance, for apparently carrying on in the usual way the business of the partnership of which he is a member bind the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no authority.

Corresponding section 5 E.

There are four differences in the wording of this paragraph and section 5 of the English Act.

First: The English Act declares that the partner is an agent of the firm *and his other partners;* also that the Acts "bind the firm *and his partners.*" The words italicized are omitted as unnecessary, and indeed, implying a conception of partnership contrary to the aggregate theory of the present draft and of the English Act.

Second: The English Act provides that the acts of every partner who does any act for the carrying on in the usual way business *of the kind carried on by the firm of which he is a member,* bind the firm and his partners." Section 7 of the English Act, which corresponds to section 12, *infra,* deals with acts done by a partner in the partnership name which do not bind the partnership. In this section of the English Act the words "for a purpose apparently not connected with the firm's ordinary course of business" are used.

It is clear that since sections 5 and 7 of the English Act and 11 and 12 of this draft relate to mutually exclusive matters, each section should use similar words to describe the scope of the partner's authority. The words employed in this draft, "apparently carrying on in the usual way the business of the partnership of which he is a member," are intended to express the present law.

If A and B are partners carrying on a particular business, A may bind the partnership by an act which is apparently within the scope of the business as it appears to be carried on, whether he really intends the act to benefit the partnership or not. If it appears to be carried on in a wholly different manner than other businesses of the same general kind, A could not bind the partnership by a contract within the scope of generally similar businesses but clearly without the scope of the business as actually carried on. For instance, it is usual for department stores to include a book department, but if A and B, being in the department store business, did not conduct a book department, a contract for the purchase of books made by A, would not bind the partnership. Under the wording of section 5 of the English Act, a doubt might be raised in regard to such a question. The words now used, it is submitted, minimize such possibility.

Third: The 5th section of the English Act concludes with the words "or does not know or believe him to be a partner." These words are based upon *dicta* in the cases of *Nicholson* v. *Ricketts,* 2 E. & E. 524 (1860), and *Holmes* v. *Hammond,* L. R. 7 Ex. 233 (1872), which criticize the prior case of *South Carolina Bank* v. *Case,* 8 B. & C. 427 (1828). Lord Justice Lindley [Partnerships (7th Ed.) 145] approves these words, but Sir Frederick Pollock [Partnerships (7th Ed.) 28] appears to cast some doubt upon them on account of the case of *Witteau* v. *Fenwick* (1893), 1 Q. B. 346, a case of principal and agent. See also *Hubbard* v. *Tenbrak,* 23 W. N. C. 351 (1889), and *Chemical Co.* v. *Purchasing Co., 22* Pa. Sup. Ct. 426.]

No case has been found in America which gives support to the words "or does not know or believe him to be a partner," and none of the textbooks refer to such principle. [*Baxter* v. *Clark,* 4 Ired. (N. C.) 127 (1813); *Everett* v. *Chapman,* 6 Conn. 347 (1827); *Reynolds* v. *Cleveland,* 4 Cow. (N. Y.) 282 (1825), (*semble*); *Livingston* v. *Roosevelt,* 4 Johns. 251 (1809), *semble; Holmes* v. *Burton,* 9 Vt. 255 (1837); *Tucker* v. *Peaslee; 36* N. H. 167 (1858), (semble); *Bank* v. *Hennessey,* 48 N. Y. 550 (1872); *National Bank* v. *Cungan,* 91 Va. 245, 357, 358 (1892); *Jones* v. *Hoadley,* 115 N. Y. App. D. 487 (1906); *Sinkler* v. *Lambert,* 5 Phila. (Pa.) 36, 40 (1862) *Winship* v. *Bank,* 5 Pet. 529, 555, 560 (1831); Bates on Partnership (188), sections 322, 323; James Parsons, section 138; Beale's Parsons, section 84; 30 Cyc. 479.] The words quoted from the English Act are broad enough to cover any partner, whether secret, active, or dormant, who acts in an undisclosed capacity, as well as the case where the partnership itself is an entirely secret relation. In every such case the partners could escape liability by setting up that the partner acting had no authority to bind the partnership in the particular matter. Practically, therefore, ratification would be necessary to bind in contract or receipt of the benefit to bind in *quasi* contract. That a partnership contract was intended by the acting partner would not be of itself sufficient or

material to the issue. Such a result places a greater burden, than at present existing, on the third person and promotes acting in an undisclosed capacity. If a partner desires to commit a fraud upon his co-partners, these words will not prevent him; for by disclosing the fact that he is a partner he possesses the full authority of a partner and can bind the partnership within his apparent authority and in a contract only apparently intended for the partnership. It is submitted that a partner is liable for the acts of his co-partners because he is an owner of the business. Whether he is held out as an owner or not is immaterial. An attempted restriction on the ordinary authority to act in a representative capacity, whether as partner or agent should be equally ineffective whether the undisclosed principal is a partnership or a person.

Fourth: The words "including the execution in the partnership name of deeds of obligation and conveyance" do not appear in the English Act. They are inserted so as to avoid any possible doubt as to whether a partner has the authority, in the ordinary course of business, to enter into formal contracts for his partnership, or to convey partnership property. Paragraph 2 of this section avoids, it is submitted, any possibility of uncertainty *in re* the conveyance of real property.

(2) Where title to real property is in the partnership name under the provisions of section 10 (3), any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of this section, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner in making the conveyance, has exceeded his authority.

(3) Where title to such property is in one or more but not all the partners, the partners in whose name the title stands, may convey title to such property, but the partnership may recover such property if the partners act does not bind the partnership under the provisions of paragraph (1) of this section, unless the record did not disclose the right of the partnership in such property and the purchaser or his assignee, being a holder for value, did not know of that right.

(4) Where the title to such property is in the names of one or more or all of the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the

partnership provided the act is one within the authority of the partner under the provisions of paragraph (1) of this section.

(5) Where the title to such property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

(6) The term conveyance as employed in this section includes any mortgage, encumbrance, lease, or assignment.

No corresponding provisions in the English Act, and the paragraphs are new to this draft.

In view of the uncertainty surrounding the subject of the conveyance of real property belonging to a partnership, the draftsmen have attempted to cover every combination of circumstances that may arise. The provisions express what may be said, on the whole, to be the present law, except that the provision for holding and conveying title in the partnership name, as provided by section 10 (3) *supra*, is carried out.

Under the provisions of (2) if A, B and C are partners holding land X in the partnership name, A by signing the partnership name to a deed conveying the land to D passes the legal title to D; but D, knowing the land to be partnership property, would take exactly the same risk as if he bought from a partner a piece of personal property belonging to the partnership. If D desires to sell the property to E, E would not be required to examine the partnership articles, the character of the business, and the relation of the particular piece of land to that business. He could safely purchase from D unless he had knowledge that A had exceeded his authority, or knowledge of other facts from which an ordinarily prudent man would obtain knowledge. (See section 5, *supra*.) These provisions of (2) seem to be essential if section 10 (3) is to become a new and convenient form of holding and conveying partnership real property. There is an essential difference between the position of a trustee having the legal title to land, and the position of a partner where real property of the partnership is in the partnership name. The trustee by recording the terms of his trust places on record an instrument which should show the extent of his power. If the purchaser is in doubt he can always ask that the trustee secure the advice and sanction of the court. The incidental delay is not important because a trust is primarily for the care of property—not the conduct and management of a business. The rule that a subsequent purchaser, having notice from the record that one of the links in his chain of title is a conveyance by a trustee is bound by the terms of the trust does not prevent trustees selling property, because the facts of the ordinary case enable the trustee, if he has a right to sell, to give the purchaser a marketable title. But the rule if applied to the purchaser of a title once held by a partnership in the partnership name, would prevent anyone being willing to take such title from a partnership, because when such purchaser came to re-sell he would have to show, beyond all peradventure of doubt, that the partner signing the partnership name to the conveyance had not exceeded his power; and practically, as the purchaser from the assignee would have usually no means of ascertaining the exact nature of the partnership business and the relation which the land had borne to that business, he would refuse to take the title unless he had a deed signed by all the partners releasing their rights. (2) therefore, is inserted to avoid the practical necessity of anyone who desires to purchase property held in the partnership name, securing in addi-

tion to the deed so signed, a deed signed by all the partners. The objection that the provision would enable a partner to secretly dispose of partnership real estate by conveying it to a man of straw, who would re-convey to a third person, is met by the fact that the partners do not have to have partnership real property held in the name of the partnership; that if they take advantage of 10 (3), it would be because they desired to make the property subject to conveyance by any partner; and that if they desire this they must take the risk that a partner may prove dishonest.

Section 12. (1) Where less than all the partners pledge the credit of the partnership for a purpose apparently not connected with the partnership's ordinary course of business, the partnership is not bound unless such act is specially authorized by the other partners.

Corresponding section 7 E.
This section is identical with the English Act except in one particular. The English Act uses the expression, *"one partner,"* instead of *"less than all."*

(2) In particular, in the absence of special authority, a partner has no authority to do any of the following acts unless his partners have wholly abandoned the business to him.

(*a*) To make an assignment of the partnership property or any portion thereof in trust for the benefit of a creditor or of all the creditors.

(*b*) To dispose of the good will of the business.

(*c*) To do any act which would make it impossible to carry on the ordinary business of the partnership.

(*d*) To confess a judgment.

(*e*) To submit a partnership claim to arbitration.

No corresponding provisions in the English Act.
This paragraph is adopted from the Western Code States. (Cal. Civ. Code, section 2430).
As a result of the discussion at the Philadelphia meeting of the Committee, the words "or are incapable of acting" of 11 (2) C are here omitted. They did not accurately express the present law, being too inclusive. The words "to a creditor or to a third person" of 11 (2a) C are omitted because unnecessary. 11 (2b) C which prohibited the disposal of the whole of the partnership property at once, unless it consisted entirely of merchandise, is omitted because, as far as it is an accurate expression of the present law, it falls within the scope of (*c*). Clauses (*d*) and (*f*) were the subject of some discussion at the Philadelphia Conference, but are retained as expressing the present general law though both are permitted in a few states.

Section 13. [Restrictions upon Authority of a Partner.] If it has been agreed between the partners that any restrictions shall be placed on the power of any one or more of them to bind the partnership, no act done in contravention of the agreement is binding on the partnership with respect to persons having knowledge of the agreement.

Corresponding section 8 E.

The section is identical with the corresponding section of the English Act with the exception that the word "knowledge" is here employed while the word "notice" is used in the English Act. As here drawn, in view of the definition of knowledge in section 5, *supra*, the act of the partner would bind the partnership unless the person dealing with him had actual knowledge of the restriction or knowledge of other facts from which an ordinarily prudent man would obtain knowledge. This may be said to be the present law.

The various classes of restrictions are 1st, those pertaining to the things which should not be bought or sold; 2nd, those pertaining to particular subjects, as commercial paper; 3rd, those which pertain to quality or amount, as that a partner should not bind the partnership for more than a certain sum or buy more than a certain quantity of goods; 4th, those which pertain to persons, as that a partner should not deal with A or B or C. All these classes may be subject to special limitations of time and space, as that one partner shall not make any contracts until he has heard of a certain event, or for that part of the business conducted in the town of X. In many cases the third person who knew of the agreement has no way of knowing whether the act which the restricted partner proposes to do is or is not within the restriction except from the assertion of that partner. Under similar conditions if the person whose authority is restricted is an agent but not a partner, the person dealing with the agent, knowing of the special limitations, takes the risk of the act being as represented by the agent within his authority. The section as here drawn, and the English Act, applies the same rule to partners, where the person dealing with the partner, who is the general agent of his co-partners within the scope of the business, knows of a special limitation on the general authority. It has been suggested that the person dealing with the partner should not only know of the restriction, but that the act was a violation of it. To carry out the suggestion the words "persons having knowledge of the agreement," should read "persons having knowledge that the act was in violation of the agreement." This may be advocated on two grounds. First, that the rule of agency in regard to special restrictions is unfortunate and should be changed Even if this is a correct position, and there is much to be said for it, the change should not be effected in a Partnership Act. Second, that there are special reasons why the rule should be different in partnership. As the draftsmen have not proposed any change in the law, or any special rule in regard to partnership which is not the law of agency under similar conditions the only justification for allowing the section to remain in the Act, is to remove any doubt that the ordinary principles of the law of agency apply here as in other cases, a doubt which perhaps is not wholly removed in this instance by the general provisions in section 6 (3), *supra*.

Section 14. [Partnership bound by Admission of Partner.] An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this Act is evidence against the partnership.

Corresponding section 16 E.

The corresponding section provides: "An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm."

The section as here stated is an attempt to express the present law. [30 Cyc. 522.] Admissions before dissolution concerning a particular matter should bind the partnership only where the partner has authority to act in the particular matter; and after dissolution only if necessary to wind up the business. Where the partner has no authority to act and the person with whom he is dealing knows he has no authority, or where the admission is made after dissolution and is not for the winding up of affairs, it should not affect the partnership. If it is not the act of the partnership then it should not be evidence against it. The words "within the scope of his authority as conferred by this Act" appear to produce this result.

Section 15. [Partnership Charged with Knowledge of or Notice to Partner.] Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

Corresponding section 16 E.

This section deals with the effect on the partnership of "notice to" or "knowledge of" a partner using those words as defined section 5, *supra*. At present, there is no confusion in the law when the "notice" is given to the partner while he is a partner. In such case the effect is the same as if notice was had by all the partners. Where the knowledge or notice has been received by the partner before he became a partner, and his partners are ignorant of this, and he is not the partner acting in the particular matter, there is no doubt that there has been neither knowledge of or notice to the partnership. Where, however, the partner acting in the particular matter, acquired knowledge before he became a partner, and the knowledge is then present in his mind, the weight of authority, and, it is submitted, of reason, appears to be that the partnership should be charged with knowledge (Mechem on Agency, page 721). It is believed that the wording now suggested,—*acquired while a partner or then present to his mind*,—effects the result desired.

The draftsmen have been unable to ascertain the present law when "knowledge," which is not the knowledge that may come from notice, has been obtained by a partner after the formation of the partnership, but the

partner having such "knowledge" is not the one acting in the particular matter. It is submitted that in this case the partnership should be charged only when the partner having "knowledge" had reason to believe that the fact related to a matter which had some possibility of being the subject of partnership business, and then only if he was so situated that he could communicate it to the partner acting in the particular matter before such partner gave binding effect to his act. The words "who reasonably could and should have communicated it to the acting partner" are designed to accomplish this result.

The wording of the English Act is: "Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner." It is submitted that this wording leaves much uncertain, which may be made certain, and, in its implied limitation to partners habitually acting in partnership is not in accordance with American law.

Section 16. [Partnership Bound by Partner's Wrongful Act.] Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Corresponding section 10 E.

This section is identical with the corresponding section of the English Act.

Section 17. [Partnership Bound by Partners Breach of Trust.] The partnership is bound to make good the loss:

(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b*) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by one or more of the partners while it is in the custody of the partnership.

Corresponding section 11 E.

This section is identical with the corresponding section of the English Act, except that the concluding words of (*b*) in section 11 E, "The firm is liable to make good the loss," as they apply equally to (*a*), are transferred to the introductory sentence.

Section 18. [Nature of Partner's Liability.] (1) For everything for which the partnership becomes liable under either of the two last preceding sections, each partner is liable jointly with his partners and also severally.

Corresponding section 12 E.

This paragraph is identical with the corresponding section of the English Act and declares the present English and American law [30 Cyc. 535, Beale's Parsons, section 100, *et seq.* Burdick, 191-215, 252, Lindley, 228; Note in 41 L. R. A. 650; 51 L. R. A. 463].

(2) For all other debts and obligations of the partnership, each partner is liable jointly with his co-partners [but for the purposes of suit the liability shall be deemed to be joint and several].

Corresponding sections 9 E.

The English Act reads: "Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner." The rest of the section in the English Act deals with the liability of the estate of a deceased partner, a subject here treated under section 43 (4), *infra*.

The words "for all other debts and obligations" are here used instead of "debts and obligations," the words used in draft C as well as in the English Act, because the word "debts" in American statute law usually includes "debts founded on tort" as well as those "founded on contract."

The words "while he is a partner" of the English Act are omitted because under this draft the retirement of a partner dissolves the partnership. The admission of a partner (see section 20, *infra*), does not dissolve a partnership, but the incoming partner is liable for the existing debts of the partnership. Though that liability can only be satisfied out of partnership property, it is nevertheless for torts a joint and several, and for contracts a joint liability.

The Philadelphia Meeting of the Committee directed the draftsmen to make all partnership liability "joint and several." The draftsmen understood that this direction on the part of the Committee was based on the assumption that the great majority of States had by statute already made the liability "joint and several," and that any statute which retained the common law joint liability would meet in those States with much opposition. Investigation has convinced the draftsmen that the best practical method of meeting the situation is the one here proposed.

The actual condition of the American statute law affecting the nature of partnership liability is as follows:

In the following States by specific declaration of statutes all partnership liability is made both joint and several: [Miss. Code (1906), par. 2683; Mo. Anno. Stat. (1906), pars. 889, 892; 2 Ala. Code, par. 2506; N. Mex. Comp. L. (1897), pars. 2894, 2895, 2942, 2943; Md. Gen. Law (1904), p. 1357); W. Va. Code (1906), pars. 1996, 3467, 3787; D. C. Code ( ), par. 1205; Iowa, 1897, pars. 3465, 3468; Gen. Sta. Kansas (1900), par. 1641; Minn. Rev. Laws (1905), pars. 4282, 4283; N. C. Rev. Laws (1905), par. 413; Ark. Statutes Kirby (1904), pars. 4420, 4422.] In some of these States liability is merely

"deemed to be joint and several for the purposes of suit." In some of the States referred to the statutes are general; that is, they include all joint liability; while in others, there is the general statement followed by specific enumeration of partnership liability. But in all the States referred to the Statutes, taken as a whole, affect, not only partnership liability, but also all joint liability.

In Illinois the Court refused to interpret a general statute so as to include partnership liability [*Fleming* v. *Ross* (1907), 225 Ill. 149]; the same is true in Colorado [*Erskine* v. *Russel* (1908), 43 Colo. 453]. In New York, though the statute apparently made partners liable jointly and severally (3 Cons. L. p. 2522, par. 6), the Court refused so to interpret the Act. [*Seligman* v. *Friedlander* (1910), 138 N. Y. App. Div. 784; 123 N. Y. Supp. 583.]

In Texas, Oklahoma, Montana, Pennsylvania, New York, Colorado, Illinois, North Dakota, South Dakota, Ohio, Massachusetts, New Jersey, Georgia, Vermont, Virginia, Rhode Island, Oklahoma, Kentucky, Michigan, Maine, Connecticut, Idaho, Indiana, partnership liability is joint. In many of these States, however, the results of joint liability as known to the common law have been modified by statute and decision. The extent of the modification varies. In some each partner must be sued severally or all jointly, an election being required. In some the partnership may be sued in the partnership name, and thereafter the partners separately until satisfaction is had. In all the estate of the deceased partner is subject to liability, but in some only after action first had against the survivors; in others proof of no partnership property must first be made; in others proceedings may be first had against the estate.

It is submitted that the purpose of the statutes in those States which have made the liability joint and several was to effect certain procedural results, rather than affect the substantive law. Now the Committee subsequently directed the draftsmen to place all procedural sections in a concluding part of the Act. This direction, which has been carried out in the present draft, was made because of the belief that procedure did not necessarily form a part of the Act, and that all the Conference should be asked to do was to recommend certain procedural provisions which might be adopted or omitted by the several States, without affecting the principle of uniformity. If a State desires to adopt the Act as a whole, whether in the present paragraph the liability is declared to be joint or joint and several, is, from a procedural point of view, immaterial, because all matters of procedure are specifically covered in Part VII. If a State desires to adopt the Act omitting Part VII, and the State in question is not one which has made the liability joint and several the paragraph as here drawn, omitting the words in brackets, presents no difficulty. If such State is one which has already declared the liability to be joint and several, then the adoption of the paragraph as here drawn with the addition of the words in brackets, will preserve all existing procedural provisions. If the paragraph as here drawn is adopted by the Conference, it should be accompanied by the following declaration: "It is recommended that any State desiring to adopt this Act omitting Part VII, being a State in which partnership liability is now by statute joint and several, enact this paragraph as a whole including the words printed in brackets; all other States to enact the paragraph omitting the words printed in brackets."

Section 19. [Partner by Estoppel.] When a person by words spoken or written or by conduct represents himself, or consents to another representing him, as a partner in an existing

partnership or with one or more persons not actual partners, he is liable to any person who has, on the faith of such representation, given credit to the actual or apparent partnership, whether the representation has or has not been made or communicated to the persons so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(*a*) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(*b*) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liabilty, otherwise separately.

Corresponding section 14 (1) E.

The corresponding section of the English Act provides: "Every one who by words spoken or written, or by conduct represents himself, or knowingly suffers himself to be represented, as a partner in a particular partnership, is liable as a partner to any one who has on the faith of any such representation given credit to the partnership, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made." The words "knowingly suffers" have been held to make a person liable if he has been held out as a partner and knows that he is being held out, unless he prevents such holding out by legal means, if necessary. [*Walter* v. *Ashton* (1902), 2 Ch. 294; Lindley (7th Ed.), 72.] There is American authority supporting this view. [*Fletcher* v. *Pullen*, 70 Md. 205 (1889); *Tanner* v. *Hall*, 86 Ala. 305 (1888); *Rittenhouse* v. *Leigh*, 57 Miss. 697 (1880); *Speer* v. *Bishop*, 24 Ohio St. 598 (1874); Prof. Burdick in 30 Cyc. 393.] Such was not the common law of England. [*Newsome* v. *Coles*, 2 Camp. 617 (1811); *ex parte* Central Bank (1892), 2 Q. B. 633; *Burchell* v. *Wilde* (1900), 1 Ch. 551.] This earlier English law is in harmony with the general principles of estoppel and appears to be supported by the better legal and business reasoning. Mere knowledge of a representation made by another does not raise a duty to speak unless it is made in the presence of the party to be affected, who stands silently by. To require that if he knows he is being held out he must prevent the holding out or the reliance, even where the holding out was not due to any act or consent of his, is carrying the matter too far. To bring the law into harmony with this view and the more satisfactory cases, this draft requires the person to represent himself or to consent to another so representing him. [*Morgan* v. *Farrel*, 58 Conn. 413 (1890); *Bishop* v. *Georgeson*, 60 Ill. 484 (1871); *Thompson* v. *Bank*, 111 U. S. 529 (1883); *Fisher* v. *McDonald*, 85 Ill. App. 653 (1899); *Ihmsen* v. *Lathrop*, 104 Pa. 365 (1883); Wood's Collyer, 75 N.]

To avoid the consequences of *Scarf* v. *Jardine*, 7 App. Cas. 345 (1882), it is declared that he is jointly liable with the members of the partnership or the persons represented to be partners.

The principal defect of the wording of the English Act is that it is not clear whether the Act as drawn includes the case in which A represents himself or consents to being represented as a partner with B, B not being in partnership with A or with any one else. In such a case, where both A and B consent to the representation, the question whether any one who relies on the representation can have priority on the property in the business in which A is represented as a partner, is not clear under the decided cases. The case of *Thayer* v. *Humphreys*, 91 Wis. 276, held that the creditors of two persons who represented themselves to be partners when only one of them owned the business, took precedence over the individual creditors of the person who owned the business as to the property in the business. Other cases have reached an opposite conclusion. Burdict, p. 76, *et seq.*

By the wording of the paragraph as now proposed it is intended that when a partnership liability results, the person held out as a partner is liable as if he were a member of the partnership; but when no partnership liability results, he is liable jointly with the other persons, if any, who consent to the contract or representation; or, if no one, except himself, has consented to the contract or to the representation, then he alone is liable. This last case, of course, could only arise where he represented himself to be a partner and made the contract himself, both acts being without the consent of the person or persons whom he represented as his partners.

Section 21 (3), *infra*, enables a person liable under this section to exonerate himself as to all future liability in the same manner as if he were a partner in fact.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

No corresponding section in the English Act.

This part of the section is intended to declare the agency of the person held out as it exists in the present law in accord with the principles of estoppel. (30 Cyc. 395; Jas. Parsons, section 69.)

Where there is an existing partnership each partner must for himself consent to the holding out of a person not an actual partner. Where they all consent the status is the same as if a new partner, making no contribution to the partnership property, had been admitted into the partnership, or that which would not have been a partnership act has been made such by the consent of all. In such case the partnership property is subject to liability. But when no partnership in fact exists, or when all the partners do not consent so as to create a partnership liability, there is either no

partnership property; or, if there is any, it is not subject to the liability. In this manner the confusing questions as to the rights of partnership and separate creditors are avoided, and the results of the cases of *Thayer* v. *Humphreys*, 91 Wis. 296 (1895), and of *Broadway Bank* v. *Wood*, 165 Mass. 312 (1896), criticised by Prof. Burdick, Partnerships 76, 292, are avoided.

Under this section if A, B and C are partners, and they all consent to D being held out as a partner; D, making a contract for the partnership, within the ordinary scope of the business of the partnership, with a person who relies upon the representation, makes a contract which will bind the partnership, and D may be sued as a partner on such contract with A, B and C. If, however, A and B consent to the representation that D is a partner, but C does not consent, then it would not be a partnership contract, but only a joint contract of A, B and D.

To avoid misunderstanding it should be pointed out that there are two cases not affected by the paragraph. A, B and C are partners. A and B represent or consent to the representation that D is a partner, but C does not consent. Suppose that the partnership is a partnership for buying and selling sheep. D contracts on behalf of the partnership to buy certain sheep from E. Under this contract E delivers the sheep to the partnership by delivering them to A or B, who accept the sheep on behalf of the partnership. Again, suppose that A and B told D to make a contract, on behalf of the partnership, with E for the purchase of sheep, and D did so, E relying on the representation that D was a partner. In both of these cases E has his choice of suing A, B and D jointly, or of suing the partnership composed of A, B and C. If he sues A, B and D jointly, he sues them under this section. If he takes the position, which is in accordance with the real facts, that A and B as partners have appointed D to make for the partnership a specific contract, which as partners they had a right to do; or that A and B have ratified a contract which was made by an outsider for the partnership and in the name of the partnership—which again, they as partners have a right to do—there is nothing in this section which prevents such suit, The section merely deals with the power of the person held out as a partner by estoppel to bind the partnership, or the persons holding him out, because the partnership or the persons have so held him out; but does not prevent the partnership being liable in the ordinary way, if, entirely apart from the representation that the person is their partner, the partnership is liable.

The subject of paragraph (2) of section 14 D and of 18 (4) C, the liability of the estate of the deceased partner, where the business is continued in the old partnership name or in the deceased partner's name as part thereof is in this draft treated in section 42 (2) and 44 (10), *infra*.

Section 20. [Liability of Incoming Partner.] *Where a person is admitted as a partner into an existing partnership, he is liable for all the liabilities of such partnership, whether arising before or after his admission, as though he were a partner when the liability was incurred, except that his liability shall be satisfied only out of partnership property.*

Corresponding section 17 E.

The corresponding section of the English Act expressly provides that the incoming partner is not liable for liabilities of the partnership existing at the time of his admission.

The section as presented, is drawn as it is for the purpose of eliminating the difficulties which arise as to creditors' rights upon the admission of a new partner without the retirement of any member. Though there is considerable confusion among the authorities, the general view is that a new partnership thereupon arises. Where, however, no notice of the change in membership is had by the creditors and their rights are impaired thereby, the Courts make great effort to find an assumption of liability on the part of the new partnership of the debts of the old partnership. This assumption of liability is frequently implied from the facts and circumstances.

The difficulty is illustrated by the common case where all the property of the existing partnership is taken over, without notice or any break in the course of business, by the new partnership composed of all the members of the existing partnership and the incoming partner; thereby depriving the existing partnership of all its property. Both the existing and the subsequent creditors may believe it is one and the same partnership, but such would not be the case under the present law in the absence of an estoppel, which seldom arises. There is no peculiar equity in the subsequent creditors giving them a right to be preferred, as against the property employed in the business, to the existing creditors. The incoming partner partakes of the benefit of the partnership property and an established business. He has every means of obtaining full knowledge and protecting himself, because he may insist on the liquidation or settlement of existing partnership debts. The creditors have no means of protecting themselves. So as to preserve the present law as nearly as possible it is declared that the liability of the incoming partner shall be satisfied only out of partnership property. It, therefore, results that existing and subsequent creditors have equal rights as against partnership property and the separate property of all the previously existing members of the partnership, while only the subsequent creditors have rights against the separate estate of the newly admitted partner. The result cannot be avoided by a dissolution by mutual consent without a liquidation of affairs for the partnership exists under this Act (see Part VI, *infra*), until all the partnership liabilities are satisfied.

The section should be read in connection with section 44, *infra*. Both sections are based on the principle that where there has been one continuous business the fact that A has been admitted to the business, or C ceased to be connected with it, should not be allowed to cause, as at present, endless confusion as to the claims of the creditors on the property employed in the business; but that all the creditors of the business, irrespective of the times when they became creditors and the exact combinations of persons then owning the business, should have equal rights in such property. It is submitted that the recognition of this principle solves one of the most perplexing problems of present partnership law.

Section 21. [Exhoneration from Future Liability.] (1) A partner may limit his liability to any third person as to any particular contract to his interest in the partnership by giving a written or verbal statement to such third person, before the contract is made, that he assumes no liability as to such contract.

There is no corresponding section in the English Act.

The paragraph deals with a situation in which a partner disapproves of a contract desired by his other partners. The section is designed to

avoid the necessity of his either submitting to the contract and becoming unlimitedly liable or dissolving the partnership. It permits him to limit his liability to third persons to his interest in the partnership. The general policy of this section was discussed and apparently approved at the Philadelphia meeting. The draftsmen, however, believe that the partner who desires to limit his liability in the manner indicated should not be able to do so by claimng that the person with whom the contract is made knew of this desire, where the "knowledge" came from a third person, or that notice which did not involve knowledge should be sufficient, because it is not an ordinary business fact (see note to section 41, *infra*). Nothing short of a delivery by the partner or by some one on his behalf, of a written or verbal statement to the third person should be permitted to accomplish the result.

The paragraph expresses the present law in all cases where there are only two partners [*Leavett* v. *Peck* (1819), 3 Conn. 124; *Feigley* v. *Sponeberger* (1843), 5 W. & S. (Pa.) 564; *Yeager* v. *Wallace*, 57 Pa. 365; *Matthews* v. *Dare* (1863), 20 Md. 248; *Knox* v. *Buffington* (1879), 50 Iowa 320; *Carr* v. *Hertz* (1895), 54 N. J. Eq. 127; *Galway* v. *Mathew*, 1 Camp. 402, 10 East. 264; *ex parte* Holsworth, 1 M. D. & D. 475; *Vice* v. *Fleming*, 1 Y. & J. 227; *Alderson* v. *Pope*, 1 Camp. 404; Lindley on Partnership (7th Ed.) 201, 239; *Monroe* v. *Conner*, 15 Me. 178; *Bradley* v. *Pollock*, 104 Ala. 402; *Lapentina* v. *Lettieri*, 72 Conn. 377; *Drum* v. *Hanna*, 25 La. Ann. 645.] Where there are more than two partners the law may be said to be in doubt. In *Feigley* v. *Sponneberger*, *Bradley* v. *Pollock*, *Mathews* v. *Dare and Lapentina* v. *Lettieri*, the right is recognized. In *Daw* v. *Sayward*, 12 N. H. 271; *Harvey* v. *Howell*, 5 Ark. 270; *Campbell* v. *Bowen*, 49 Ga. 417; *Kirk* v. *Hodgson*, 3 John. Ch. 400; *Johnston* v. *Dutton*, 27 Ala. 245; *Cole* v. *Moxley*, 12 W. Va. 747; *Clarke* v. *R. R.*, 136 Pa. 408 and *Markle* v. *Wilbur*, 200 Pa. 457; the right is either directly or inferentially denied.

Under the wording of this provision the third person possesses all rights against all the partnership property, including the profits of the particular transaction. He is excluded only from the separate property of the particular partner. He makes the contract with full knowledge of these facts. Paragraph 4 makes the partner liable to his co-partners in case his action is contrary to his contract with his partners.

(2) A partner may exonerate himself from all liability to third persons or to his co-partners on account of all future contracts, except such as may be necessary to wind up or liquidate partnership affairs or to complete transactions begun but unfinished, by giving knowledge or notice, as provided by sections 41 and 42 of this Act, to his partners and to third persons, that he dissolves the partnership.

No corresponding provision in the English Act.

This paragraph merely declares the results produced under Part VI. It is here introduced for the sake of the completeness of the section.

Draft C did not contain the word "knowledge." The addition of the word "knowledge" is due to the fact that "notice" and "knowledge" have in this draft exact meaning. [See section (5), *supra*.] In the sections dealing with dissolution, "knowledge" is in every case as effectual as "notice" to free the partner dissolving the partnership from liability for contracts subsequently entered into by his partners.

(3) One liable as a partner by estoppel may exonerate himself from liability on account of any particular future contract, or as to all future contracts, in the same manner as though he were a partner in fact.

There are no corresponding provisions in the English Act.

This paragraph, and the other parts of this draft referring to the rights and liabilities of a person held out as a partner, are based upon what, it is submitted, is a necessary assumption, that such person, not being a partner in fact, is not within the provisions of this Act except in so far as it is expressly declared. The paragraph declares the present law.

(4) The foregoing provisions of this section do not in any manner affect any liability to his partners or apparent partners for any damages caused to them by reason of the breach of any contract.

There are no corresponding provisions in the English Act.

This provision is introduced to save the rights of the parties to damages for the breach of any contract. It applies equally to the contract forming the partnership and all other contracts, and to the circumstances of all the foregoing provisions of this section.

Section 22. [Fraudulent Conveyances.] (1) Every conveyance, transfer, assignment, or encumbrance of partnership property by any or all of the partners made or given voluntarily and without a present fair consideration to the partnership as distinguished from a consideration to the individual members, while insolvent within the meaning of the Federal Bankrupt Act, or in contemplation of such insolvency, shall be fraudulent and void as against the partnership creditors and their successors in interest, and as against any person upon whom the estate devolves in trust for the benefit of creditors.

(2) Every conveyance, transfer, assignment, or encumbrance of partnership property, every obligation incurred and every judicial proceeding taken, with intent to hinder, delay, or defraud any partnership creditor, or other person, of his demand against the partnership is void, except as to purchasers in good faith and for a present fair consideration, as against the partnership credi-

It is submitted, that if it is improper for partners to assign the partnership property to one of their number when they are insolvent, it is their duty to know the condition of their affairs when they make such an assignment or, at least, that the rights of their partnership creditors should not depend on their being able to prove such knowledge on the part of the partners.

It is manifest that partnership creditors may be injured by a transfer of partnership property to an insolvent partner, although at the time of the assignment the partnership was solvent. Therefore, the words "when the partnership *or the assignee partner* is insolvent."

It will be noted that an assignment of partnership property to a partner often in fact injures the separate creditors of the assignee partner. So also the assignment of the separate property of a partner to pay partnership debts may injure his separate creditors. These questions, however, are outside the scope of a Partnership Act. There is nothing in the present section which prevents the separate creditors, in a proper case, from protecting their rights. The paragraph deals only with the rights of the partnership creditors, neither enlarging, contracting, or in any way affecting the rights of the separate creditors.

Section 23. [Revocation of Guarantee by Change in Partnership.] A continuing guaranty given either to a partnership or to a third person in respect of the transactions of a partnership is, in the absence of an agreement to the contrary, revoked as to future transactions by any change in the constitution of the partnership to which, or of the partnership in respect of the transactions of which, the guaranty was given.

Corresponding section, 18 E.

This section is identical with the corresponding section. Considerable criticism of this section has been received to the effect that the revocation should not be effective as against third persons who rely upon the guaranty in ignorance of a change in the membership of the partnership. Under the existing English law and the American cases, notice is in all cases immaterial. In two American cases the contrary has been found as *dicta*. [*Cremer* v. *Higginson*, 1 Mason 337; noted *in re* Clinque (1901), 109 Fed. 455.] These cases are, however, not followed in the other cases. The American cases are based upon the English cases of *University of Cambridge* v. *Baldwin* (1839), 5 M. & W. 50; *Blackhouse* v. *Hall* (1865 and 6), *Best* v. *Smith*, 519, all of which hold that notice or knowledge are immaterial. [Beale's Parsons, section 236; Story, sections 245-251; Lindey, 137-141; Stearns on Suretyship, pp. 194, 205, 209. Brandt on Suretyship, section 136. Rowblatt (Eng.) on Suretyship 93—which quotes section 4 of the Mercantile Law Amend. Act 1856 declaring that a change in the partnership terminates the guaranty unless the intent is otherwise. No notice required. See also *Burch* v. *De Rivera* (1889), 53 Hun 367; *Bank* v. *Mitchell*, 15 Conn. 207 (1842), *Barnes* v. *Barrow*, 61 N. Y. 42 (1874); *State* v. *Boon*, 44 Mo. 254; *Holmes* v. *Small*, 157 Mass. 221; *Lyon* v. *Plumn*, 69 Atl. (N. J.), 209 (1908); *Grant* v. *Naylor*, 4 Cranch 224; *Schoonover* v. *Osborne*, 108 Ia. 455 (1899); *Forst* v. *Kirkpatrick*, 64 N. J. Eq. 578.] The exact facts are presented and ruled as in this section in *Byers* v. *Heckman Grain Co.* (1900), 112 Ia. 455.

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This section has application: (1) Where the guarantor contracts directly with the partnership and guarantees to pay the debt of another to such partnership. (2) Where the guarantor guarantees the account of a partnership against their servants. (3) Where the guarantor guarantees the account of a partnership to some third person.

The whole question is primarily one of contract and guaranty and only incidentally touches partnership law. The draftsmen believe that if the law of guaranty needs amendment, the change should not be effected in a Partnership Act, but rather in an Act relating to Guaranty, and that, therefore, this section as drawn should be adopted, or all mention of the subject omitted.

PART IV.

RELATIONS OF PARTNERS TO ONE ANOTHER.

This part of the present draft corresponds to sections 24, 28, 29 and 30 of the English Act.

In this draft all reference to the nature of a partner's right in specific property and his share in the partnership are placed under Part V, "Nature of Partner's Interest." Section 19 of the English Act, which declares that the "mutual rights and duties of partners," "may be varied by the consent of all the partners" is omitted, because in this draft whenever a right may be varied by consent it is so stated, and because a general declaration in the words of the English Act may tend to create the impression that the incidents of partnership, co-ownership, and of a share in the partnership may be changed by agreement, whereas they are fixed by law as a result of the relation assumed by the partners in forming the partnership. For instance, a share is personal property, and is assignable. (See sections 33 and 34, *infra.*) These incidents cannot be varied by consent, though, of course, a partner may will his share to his heir, or, by agreement with his partners, stipulate that an assignment of his share shall cause its forfeiture to his partners.

Section 24. [Rules Determining Rights and Duties of Partners.] The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

Corresponding section 24 E.

This introductory part is identical with the English Act, except that the words, "interest of partners in the partnership and their," before word "rights" are omitted. In the present draft the expression "interest of a partner" includes only his right as co-owner of specific partnership property and his share in the partnership as defined in section 31, *infra.* The legal incidents of this interest as thus defined are not subject to alteration by agreement. This section deals with certain specific rights and duties which are subject to agreement.

(1) Each partner is entitled to repayment of his contributions, whether by way of capital or advances, to the partnership property and to share equally in the profits and surplus remaining after all liabilities including those to partners are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

Corresponding section 24 (1) E.

The English Act reads: "All partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the partnership."

This apparently gives a different rule for sharing losses than that here proposed. But section 44 (*a*) E provides: "Losses, including losses and deficiency of capital, shall be paid * * *, if necessary, by the partners individually in the proportion in which they were entitled to share profits." In view of this paragraph section 24 (1) E has been interpreted as the present section is worded [*Garner* v. *Murray* (1904), 1 Ch. 57].

The paragraph declares the present law. Where the shares in the profits are agreed on but losses are not considered, the losses should be shared in the same proportion as profits. Where neither are agreed upon, they are both shared equally. (Lindley, 385, 415; 30 Cyc. 690, 691.)

(2) The partnership must indemnify every partner in respect of payments made and personal liabilities incurred by him:

(*a*) In the ordinary and proper conduct of the business of the partnership; or

(*b*) In or about anything necessarily done for the preservation of the business or property of the partnership.

Corresponding section 24 (2) E.
The paragraph is identical with the English Act.

(3) A partner, making for the purpose of the partnership any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the legal rate per annum from the date of the payment or advance.

Corresponding section 24 (3) E.
The paragraph is identical with the English Act.

(4) A partner is not entitled to interest on the capital subscribed by him except from the date repayment should be made.

Corresponding section 24 (4) E.
The English Act provides: A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him. It is submitted that the paragraph as here given, rather than the English Act, expresses the present law. [*Rodgers* v. *Clement*, 162 N. Y. 422 (1900); *Winchester* v. *Glazier*, 152 Mass. 316 (1890); 9 L. R. A. 424; Bates, section 781, *et seq.*; 30 Cyc. 698.]

(5) All partners have equal rights in the management and conduct of the partnership business.

Corresponding section 24 (5) E.
The English Act provides: "Every partner shall take part in the management of partnership business." The change in the wording of the paragraph from that of the corresponding provision of the English Act is due to the desire to emphasize the fact, that while as a matter of business judg-

ment the majority have a right to control, the majority have no right to deprive a partner of his rights as partner. The wording of the English Act might be construed so as to give him only the right to take part in the mangagement, the extent of the part to be taken in either the management or conduct of the business to be determined by the majority. (Lindley, 355.)

(6) No partner shall be entitled to remuneration for acting in the partnership business.

Corresponding section 24 (6) E.
The paragraph is identical with the English Act.

(7) No person can become a member of a partnership without the consent of all the members thereof.

Corresponding section 24 (7) E.
The corresponding section of the English Act reads: "No person may be introduced as a partner in the business without the consent of all existing partners." The different wording here suggested is due to the fact that under this draft dissolution is produced by the retirement but not by the introduction of a member. The words "existing partners" of the English Act imply that the retirement of a partner does not necessarily produce dissolution.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done without the consent of all the partners.

Corresponding section 24 (8) E.
The first part of the paragraph is identical with the English Act. The proviso in the English Act reads: "But no change may be made in the nature of the partnership business without the consent of all existing partners." Changing the nature of the business is an act in contravention of the agreement of partnership requiring the consent of all. So every act in contravention of any other agreement between the partners, whether express or implied in fact, requires the consent of all.

Section 25. The partnership books shall be kept at the place of business of the partnership (or, subject to any agreement between the partners, at the principal place if there is more than one) and every partner shall have access to and may inspect and copy any of them.

Corresponding section 24 (9) E.
The English Act is practically identical: "The partnership books are to be kept at the place of business of the partnership (or the principal place

if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them." Since the words, "when he thinks fit" are equivalent to declaring the right to exist at all times, their insertion appears to be unnecessary. In draft 29 (9) A the right to inspect the books was granted to the representative of the partner as freely as to the partner. This is not the present law. Where such representative is the legal representative the Court safeguards the respective rights. The agent can inspect only where there is no reasonable objection. [*Trego* v. *Hunt* (1896), A. C. 7; *Beavan* v. *Webb* (1901), 2 Ch. 59; 30 Cyc. 447; Beale's Parsons, section 154; Collyer, 557, 558.] The assignee has no right to inspect the books [see 34 (1), *infra*].

Section 26. [Duty of Partners to Render Information.] Partners are bound to render true and full information of all things affecting the partnership to any partner or the legal representatives of any deceased partner.

Corresponding section 28 E.

The English Act also requires the partners to render "accounts" as well as full information. This provision was also in draft C. The words "of a deceased partner" are new to this draft. They are inserted to avoid any possibility of a difference of opinion in regard to the meaning of "legal representative." The partnership relation is too personal to give to the agent of a living partner the right to demand "full information."

Draft C concluded with the proviso: "When required by the partnership agreement or by law." This provision is omitted because the section as here drawn is based on the opinion that the partner ought at all times to render true and full information of all things affecting partnership to his partners or a legal representative of a deceased partner.

The word "accounts" is omitted because the word does not have any exact meaning in our law. If the provision in the English Act means that one partner may call upon any other partner to render at any and all times a formal account of the profits and losses of the partnership, then the English Act is an innovation on the American law. If "accounts" as used in the English Act does not mean a "formal account," then the word is unnecessary, the words "full information" covering all that is required. A partner has at all times a right of access to partnership property, including partnership books. [Section 25, *supra*.] If one partner is in physical possession of the books, it is not necessary for him to give copies of the books to his partners, but it is obligatory on him "to render full information," by allowing them access to the main source of information.

Section 27. [Partner Accountable as a Fiduciary.] (1) Every partner must account to the partnership for any benefit, and hold as trustee for the partnership any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership, or from any use by him of the partnership property, name, or business connection.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

Corresponding section 29 E.

The section is similar to the English Act and to draft C, except that the words "and hold as trustee for the partnership any profits," have been added. The reason for this addition is that without this provision it is not clear whether the obligation to account where the partner has money or other property in his hands, is or is not an obligation in the nature of a trust. For instance: A, B and C are partners; A, as a result of a transaction connected with the conduct of the partnership, has in his hands, so that it may be traced, a specific sum of money or other property. A is insolvent. Is the claim of the partnership against A, a claim against him as an ordinary creditor, or as a *c. q. t.*? This question should be decided. The draftsmen, therefore, insert the words referred to, to put at rest any possibility of a denial of the right of the partnership to obtain, as against the partner's separate creditors, the money or property which is derived from a transaction connected with the formation, conduct, or liquidation of the partnership. If it is desired to make the partner a mere debtor for a sum equal to the profits he has derived, the heading of the section should read: "Partner Accountable for His Profits from Transactions Connected with the Partnership," and the words "and hold as trustee for the partnership any profits," should be changed to "and be liable as a debtor to the partnership for a sum equal to the profits."

Section 28. [Partner Accountable for his Profits from a Rival Business.] If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the partnership he must account for and be liable as a debtor to the partnership for a sum equal to the profits made by him in that business.

Corresponding section 30 E.

The section is similar to the English Act, except that it is here made certain that the partner is liable as a debtor for a sum equal to the profits which he has received, and is not accountable as a fiduciary. The necessity for making this definite is explained section 27, *supra*, note.

Section 29. [Right to an Account.] Any partner shall have the right to a formal account.

(1) As to partnership affairs,

(*a*) On dissolution as provided by this Act;

(*b*) If he is wrongfully excluded from the business or possession of partnership property by his co-partners;

(*c*) If the right exists under the terms of any agreement;

(*d*) Whenever circumstances have arisen which render it just and reasonable that an account be granted.

(2) As provided by the last two foregoing sections.

No corresponding section in the English Act, and the section is new to this draft.

Ordinarily a partner is not entitled to a formal account, except on dissolution. He has equal access with his partners to the partnership books, and there is no reason why they should constantly render to him accounts in the formal sense of that word, which is the sense in which it is here used. When, however, he is excluded from the business, or the possession of partnership property, without any express agreement authorizing such exclusion, he should have the right to demand a formal account from his partners, without necessarily requiring him to dissolve the partnership.

The reason for clause (*d*) is that there frequently arises circumstances which impose on one or more of the partners the duty of rendering a formal account to the co-partner, as where one partner is traveling for a long period of time on partnership business, and the other partners are in possession of the partnership books. These various circumstances cannot be detailed in any Act. In view of the wording of clause (*d*), the total effect of this new section is, as intended, to emphasize the fact, that a partner, the partnership not being dissolved, has not, necessarily, the right to demand formal accounts, except at particular times and under particular circumstances.

Section 30. [Continuation of Partnership Beyond Fixed Term.] (1) When a partnership, entered into for a fixed term is continued after the term has expired and without any express agreement, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuation of the partnership.

Corresponding section 27 E.

This section is identical with the English Act, except that that Act speaks of "any express *new* agreement." The word "new" is omitted as tending to produce confusion when the original partnership agreement provides for one year with a clause for renewal for a year, and such partnership is continued at the end of the year.

PART V.

INTEREST OF PARTNER.

The corresponding sections of the English Act are sections 22, 23 and 31 E.

Section 26 E, which provides that all partnership property must be held and applied to partnership uses, is omitted as unnecessary in view of the provisions of 32 (2b), *infra*.

The confusion of the present case law of partnership centres around the nature of the partner's interest. This confusion is due, it is submitted, to a failure to disinguish between the right of a partner as a co-owner of partnership property, and his share in the profits and surplus of partnership property after the partnership liabilities to third persons are liquidated. A principal justification for a Uniform Partnership Act is the desirability of ending once for all a confusion which is beyond the possibility of being straightened out by the action of forty-eight independent Courts.

Section 31. A partner's interest in the partnership is his right in partnership property, and his share in the partnership.

No corresponding section in the English Act. The section is new to this draft. The two subsequent sections define and distinguish the two elements of the partner's interest.

Section 32. [Nature of a Partner's Right's in Partnership Property.]

(1) A partner is co-owner with his partners of partnership property holding as a tenant in partnership.

(2) The accidents of this tenancy are such that:

(*a*) A partner has no right to possess partnership property without the consent of his co-partners except for a partnership purpose.

(*b*) Except as provided by section 11 (2, 3, 4, 5, 6) of this Act a *partner cannot assign his right in partnership property except for a partnership purpose without the consent of all the partners, and any attempt to make such an assignment is void.*

(*c*) A partner's right in partnership property is not subject to attachment or execution except on a claim against the partnership.

(*d*) On the death of a partner his right in the partnership property descends to his personal representatives, but

such representatives, not being the representatives of the last surviving partner, have no right to the possession of such property.

(*e*) A partner's right in partnership property is not ject to dower, courtesy, or rights under the homestead or exemption laws.

(3) Nothing in this section shall be held to permit a partner, without the consent of all the partners, to assign his rights in partnership property to a partner or a third person on the promise of such partner or third person to pay the debts of the partnership.

Clauses 2 (*b* and *c*) are the vital provisions of the section. Clause (*c*) is similar to section 23 (1) of the English Act.

The following cases show the confusion between a partner's right in specific partnership property, and his share in the partnership. They also show that the present practical result, in spite of this confusion, is substantially that which clauses *b* and *c* express: [*Heydon* v. *Heydon,* 1 Stalk. 392 (1693); *Eddie* v. *Davidson,* Douglas 627 (1781); *Taylor* v. *Fields,* 4 Ves. 396 (1799); *Lord* v. *Baldwin,* 23 Mass. 348 (1828); *Doner* v. *Stauffer,* 1 P. & W. 198 (Pa. 1829); *Tappan* v. *Blaisdell,* 5 N. H. 190 (1830); *Phillips* v. *Cook,* 24 Wend. 389 (1840); *Washburn* v. *Bank of Bellows Falls,* 19 Vt. 278 (1847); *Nixon* v. *Nash,* 12 O. St. 647 (1861); Cooper's App. 26 Pa. 262 (1856); *Menagh* v. *Whitwell,* 52 N. Y. 146 (1873); *Case* v. *Beauregard,* 99 U. S. 119 (1878.]

Under the aggregate theory of the present draft two positions in respect to a partner's right in specific partnership property may be taken. One position is that the partners are tenants in common of all partnership property, and that each partner may make a voluntary or involuntary assignment of his right in any piece of partnership property for any purpose, the assignee becoming tenant in common with the remaining partners; these partners, under the partnership agreement, retaining their right to have the property applied to partnership debts before the assignee can obtain any beneficial enjoyment. This position was taken by Holt, C. J., in the early case of *Heydon* v. *Heydon,* 1 Stalk. 392 (1693), and later, with most unfortunate results to partnership creditors, by Gibson, J., in *Doner* v. *Stauffer,* 1 P. & W. (Pa.) 198 (1829). The learned Judge in the case last cited taking the position that successive sales of the right of each partner in the partnership property on executions levied by their separate creditors, passed all the right of the partners in the property, and, therefore, deprived the partnership creditors of any right to levy on that property; while the funds in the hands of the sheriff belonged, of course, to the separate creditors.

The other position, and the one taken in clauses *b* and *c,* is that, while the partners are co-owners of partnership property, a result of the partnership is not merely that it is a contravention of the agreement between the partners to assign his right as co-owner in a piece of partnership property for his own purposes without the consent of his partners, but that one of the legal incidents of partnership co-ownership is that a partner's right as co-owner is not assignable for any other than a partnership purpose except with the consent of all his partners. The only exception is where real

property is held in the name of the partnership or in the name of one of the partners. A conveyance in the partnership name by any partner in the first case, or by the partner in whose name the title stands in the second case, would pass the legal title to the assignee, irrespective of the purpose of the assignment, subject to the right of the other partners to recover the property under the provisions of section 11, *supra*. The exception is based on the general policy of the law which allows the legal title to real property to follow a conveyance executed by the holder of the record title.

The practical result of these causes, therefore, is to render it impossible for separate creditors, or the persons to whom the partner has attempted to assign his right in partnership property, obtaining any title to that property.

Clauses *d* and *e* correspond to section 32 of the English Act. That Act provides that land belonging to a partnership shall be treated as personal estate. It is submitted that the present wording is better that this fictional method of treatment. Land is land whether belonging to one person or a partnership. The only problem is the legal incidents which attach to the right of a partner in land belonging to a partnership, in the case of his death. The English Act also provides that land shall be regarded as personal property *"unless the contrary intention appears."* It is submitted that this re-introduces all the confusion of the present law. There is no more reason why a contrary intention should effect the legal incident of the descent on death of the partner's rights as tenant in partnership, than such an intention not expressed in a will should effect the descent of a right as tenant in common. Each form of "co-ownership" has its legal incidents. These should be clearly defined, and not vary with such an uncertain element as the intention of a former owner.

The present American law in reference to the status of partnership real estate on the death of a partner is in considerable confusion [Burdick, 105-113], even in the same jurisdiction. [*Compare*, Foster's App. 74 Pa. 391 (1873); and Leaf's App. 105 Pa. 505 (1884).] Clauses *d* and *e* modify the law in most jurisdictions. The justification for this modification is that under the theory of the present draft, and probably under the present law, the partner never has a right to the separate possession of partnership property. Thus, on liquidation, after the payment of all the partnership debts to third persons; the partner has not a right to a physical division of the property that remains, but merely, a right to its sale, and to receive his proportionate share in cash. [Section 46 (1), *infra*.] If the partner has not any right to possess separately the property except in the form of money, then, under the principles of equitable conversion, he dies possessed of property in the form in which he has a right to demand it. The right should, therefore, have the same incident as personal property under similar circumstances. Besides the provisions of clauses *d* and *e* make for business convenience. The death of a partner should not make it more difficult to dispose of land belonging to the partnership.

Paragraph (3) renders definite what might otherwise be doubtful; namely, whether such an assignment is or is not for a "partnership purpose" within the meaning of (2b).

Section 33. [Nature of Partner's Share in the Partnership.]

(1) A partner's share in the partnership is his right in the profits as they accrue and in the surplus of the partnership assets after the partnership liabilities to creditors other than partners are liquidated.

(2) On the death of a partner his share in the partnership descends to his personal representatives.

As here defined a partner's share in the partnership, as distinguished from his right in specific partnership property, is the sum of his rights by reason of his association in the business, and his transactions as a member of the partnership. These include his right before dissolution to his share in the profits as they accrue, and after dissolution to all his rights in the assets as set forth in section 49 (2), *infra*.

Section 34. [Assignment of Partner's Share.] (1) An assignment by a partner of his share in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require information of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive the share to which the assignee partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by all the partners.

Corresponding section 31 (1) E.

The paragraph of the English Act is identical except that the words describing the assignment as "either absolute or by way of mortgage," are omitted as unnecessary, the word information is usual instead of account [see section 26, *supra*], and the word "all" on the last line has been inserted so as to make it certain that the assigning partner must agree to the account of profits which the assignee is compelled to accept.

In re the subject of this provision, see [George, 153; Beale's Parsons, sections 106, 305, 306; Story sections 272, 377, 308; Bates, sections 158-168, 931-933; Lindley, 397, *et seq.*, 620; Jas. Parsons section 175; Collyer, 151, 161; Kent 59.] These authorities on the whole state that the mere assignment dissolves the partnership. This may generally be the result, as where the assigning partner does not intend to take any further active part in the business or continue the personal relation, but a partner may assign all his share and yet continue the personal relation. If he neglects his personal relation the other partners may dissolve the partnership under section 36 of this Act. But the mere fact of assignment without more should not be said in all cases to be an act of dissolution. Dissolution is fully provided for in the next part of this Act, where the right of dissolution and the rights on liquidation are fully defined. If any partner desires to dissolve the partnership, he may do so, rightfully or wrongfully according to the circumstances. See section 38, *infra*.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive whatsoever the assigning partner, as between

himself and the other partners, would be entitled to receive for his share, and for that purpose may apply to the Court for an account as from the date of the last account agreed to by all the partners.

Corresponding provision 31 (2) E.

This provision differs from that of the English Act in that it declares specifically that the assignee possesses the right to receive all which the assigning partner himself could receive. It gives to the assignee all the rights which the partner himself possessed, except such as were personal rights as the right to wind up or liquidate the affairs of the partnership or to possess the partnership property for that purpose. Since he does not possess any of these rights, it is proper that he should possess the right to apply to the Court for the purpose of ascertaining and enforcing his rights. To this end he is given the right to an account. This right to an account, however, should not extend only to the time of the dissolution, for the dissolution may have happened a considerable time after the time when the last account was taken. The assigning partner may refuse to compel the other partners to account to him or to his assignee for the period of time between the time when he last agreed to an account and the time of dissolution.

Section 35. [Partner's Share Subject to Charging Order.] (1) On the application of any judgment creditor of a partner, the Court which entered the judgment, order, or decree, or any other Court, may make an order charging the partner's share in the partnership with payment of the amount of the judgment debt, or any unsatisfied amount thereof, with interest thereon; and may by the same or any subsequent order appoint a receiver of that partner's share of profits (whether already ascertained by an account or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and make all other orders and directions which might have been directed or made if the charge had been made in favor of the judgment creditor by the partner, or which the circumstances of the case may require.

Corresponding section 23 (2) E.

This provision is taken from section 23 (2) E with slight verbal changes. The English section has been construed in *Brown* v. *Hutchinson* (1895), 2 Q. B. 129. The judgment creditor does not acquire any greater rights than the debtor is entitled to for his own benefit. [*Sutton* v. *English Co.* (1902), 2 Ch. 502; *Howard* v. *Sadler* (1893), 1 Q. B. 1; *Cooper* v. *Griffin* (1892), 1 Q. B. 740; *Scott* v. *Lord Hastings*, 4 K. & J. 633 (1858).]

The paragraph is the same as that submitted in draft C, except that the words "or any other court" have been added; while the Court is given the

power to "*make*" all other orders, rather than "*give,*" the expression used in draft C.

These alterations are made upon the section as introduced by Mr. Ames [23 (2) A]. "The Court" is described. "Or any unsatisfied amount thereof" is added to "the amount of the judgment debt." "Profits" are described as "(whether already ascertaintaned by an account or accruing)" instead of "(whether already declared or accruing)" because profits are "ascertained by an account" and dividends are "declared" under the established legal terminology.

(2) The share charged may be redeemed at any time or, in case of a sale being directed, may be purchased without thereby causing a dissolution, unless as provided by section 38,—

(*a*) With their separate property, by any one or more of the partners, or

(*b*) With partnership property, by any one or more of partners with the consent of all the partners whose shares are not so charged or sold.

Corresponding section 23 (3) E.

This paragraph modifies the corresponding provisions by permitting the partners or the partnership to redeem the charge or purchase the share without causing any dissolution, unless such intention is manifested as provided by section 38, the amount paid becoming a matter of account in liquidation. This is a recognition of the principle that the personal relation may continue even though, for the time, the charged partner may have only a remote pecuniary interest in the partnership. Whether a dissolution may be rightfully had depends upon the circumstances; and whether it is desirable is a matter for the partners to decide. Where the partner's share is sold, he may cause a dissolution so as to terminate the agency and liability, but his right to an account may have been lost.

PART VI.

DISSOLUTION AND LIQUIDATION.

This Part treats of all matters concerning the dissolution and liquidation of the partnership. It corresponds to sections 32-44 of the English Act, also sections 17 (2-3) E treating of the discharge of a partner. As an attempt has been made to cover substantially all matters pertaining to dissolution and liquidation, several subjects are covered which are not treated in the English Act.

Section 37 E of the English Act, relating to the right of a partner to notify or publish dissolution and to require his co-partners to join with him for that purpose is omitted as unnecessary, and as implying, which is not the fact, that a partner, without the concurrence of his co-partners may not have the right to notify or publish the fact of dissolution.

Section 36. [Dissolution Defined.] The dissolution of a partnership is the breaking up of the personal relation caused by one or more of the partners ceasing to be associated in the business.

The English Act does not define dissolution.

In the present general law the term "dissolution" designates, not only the single act of the termination of the actual conduct of the ordinary business, but also often the series of acts thereafter until the final liquidation and settlement of all partnership affairs. It is also frequently said, that dissolution, although the word is used to designate only the termination of ordinary business relations, terminates the partnership, it being at the same time explained that the partnership thereafter continues to exist for the purpose of suing and being sued in the process of winding up all partnership affairs. Certainty demands that this confusion should be removed if possible. In this draft dissolution designates the single act of the breaking up of the personal relation. "Termination" and "liquidation" are separate and defined terms each bearing a specific meaning.

The different events which cause dissolution are detailed section 38, *infra.*

Section 37. [Partnership Not Terminated by Dissolution.] On the dissolution the partnership is not terminated, but continues until the winding up or liquidation of all partnership affairs is completed.

No corresponding section in the English Act.

This section is inserted to emphasize the fact that dissolution does not terminate the partnership. The effect of dissolution is declared in section 40, *infra.*

Section 38. [Methods of Dissolution.] The dissolution of the partnership is produced:

(1) Rightfully under the agreement between the partners,—

(*a*) By the manifest intention of any or all of the partners at the termination of the definite term or particular undertaking specified in the agreement;

(*b*) By the express will of any or all of the partners when no definite term or particular undertaking is specified;

(*c*) By the express will of all the partners, not having suffered their interests to be charged for their separate debts, whether before or after the termination of any specified time or particular undertaking;

(*d*) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners.

(2) In contravention of the agreement between the partners, where the circumstances are not such as to permit a dissolution under any other provision of this section, by the express will of any one or more of the partners at any time;

(3) By the happening of any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By any partner or the partnership becoming bankrupt;

(6) By decree of Court as provided by section 39 of this Act.

The corresponding sections are 25, 26, 32, 33 and 34 E.

The language employed in the English Act differs from that here submitted. The differences in substance are as follows:

(*a*) Section 26 E, which corresponds to 1 (b), provides that where the partnership has been formed by deed a "notice in writing" by the partner dissolving shall be sufficient. In this draft the acts which must be done on dissolution to effect the rights and duties of the other partners are dealt with in section 41, *infra*.

(*b*) There is no express provision in the English Act declaring, as paragraph (2) here declares, that the express will of any one or more of the partners dissolves a partnership entered into for a period which has not expired. The implication from sections 26 (1) E and 32 (a) is that a partner cannot dissolve a partnership in contravention of the agreement. Considerable confusion exists as to the present law. [Beale's Parsons, 299; Wood's Collyer, 166; 30 Cyc. 603-619.] Paragraph (2) appears to have the support of the weight of authority. [Cal. Civ. Code, section 2417; S. Dak. Civ. Code, section 1736; Okla. C. C. section 4850; N. Dak. C. C. section

5848; Mont. C. C. section 3262; Ga. C. C. section 2633; *Skinner* v. *Dayton,* 19 Johns. (N. Y.) 513, 537 (1822); *Mason* v. *Connell,* 1 Whart. (Pa.) 381, 388 (1836); *Monroe* v. *Conner,* 15 Me. 178 (1838); Cape Sables Case, 3 Bland (Md.) 606, 674 (1840); Slemmer's App. 58 Pa. 168, 176 (1868); *Solomon* v. *Kirkwood,* 55 Mich. 256 (1884); *Carr* v. *Hertz,* 54 N. J. Eq. 127 (1895); *Moore* v. *Price,* 116 Ala. 247 (1896); *Karrich* v. *Hannaman,* 168 U. S. 328, 334 (1897); *Lapenta* v. *Lettieri,* 72 Conn. 377 (1899); *Clement* v. *Norris,* 8 Ch. D. 129, 133 (1878). The English Law is opposed to this view (Lindley 601; *Crawshay* v. *Maule,* 1 Swanst. Ch. 509 (1818); *Featherstonhaugh* v. *Fenwick,* 17 Ves. 298 (1810); *Peacock* v. *Peacock,* 16 Ves. 49 (1809); *Ferrero* v. *Buhlmeyer,* 34 How. Pr. 33 (1867); Story, section 275.] The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in doing so he breaks a contract, should, it is submitted, be recognized. The rights of the parties upon a dissolution in contravention of the agreement are safeguarded by section 46 (2), *infra.*

(4) (5) Section 33 (1) E provides that "Subject to any agreement between the partners, every partnership is dissolved as regards all the partners, by the death or bankruptcy of any partner." It is submitted that, as dissolution is defined section 36, *supra,* the death or bankruptcy of a partner dissolves the partnership." Death of necessity ends the mutual agency, and, therefore, the partnership. Whether liquidation should take place is, of course, a matter which may be provided for in advance by an agreement between the partners. The right to affect rights of liquidation by agreement is safeguarded, section 49, *infra.* So, too, the bankruptcy of a partner, unlike a mere charging order on his share in the partnership, depriving the bankrupt of the power to contract and giving his trustee all the rights which he possessed, should also, it is submitted, be regarded as necessarily dissolving the partnerhip. How far an agreement between the partners may effect the right of the trustee to demand liquidation is a matter outside the province of this section. (See section 49, *infra.*)

Section 39. [Dissolution by Decree of Court.] (1) On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a*) When a partner has been found lunatic by inquisition, or is shown to be of unsound mind, in either of which cases the application may be made either on behalf of that partner by his committee or next friend or person having title to intervene or by any other partner;

(*b*) When a partner, other than the partner suing, becomes in any other way incapable of performing his part of the partnership contract;

(*c*) When a partner, other than the partner suing, has been guilty of such conduct as, regard being had to the nature of the business, is calculated prejudicially to effect the carrying on of the business;

(*d*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him;

(*e*) When the business of the partnership can only be carried on at a loss;

(*f*) Whenever circumstances have arisen which render it just and equitable that the partnership should be dissolved.

Corresponding sections 35 E.

This paragraph is similar to the English Act, except that as a matter of draftsmanship, the references in the English Act to the circumstance that the events justifying dissolution must be proved "to the satisfaction of the Court" are omitted as unnecessary.

(2) On the application of the purchaser of a partner's share under the provisions of Section 35 of this Act, where the partnership was a partnership at will at the time the charging order was issued, or the term for which such partnership was formed has expired.

No corresponding provision in the English Act. Under this draft, as under the English Act [see section 33 (2) E], the fact that a partner has suffered his share to be charged by a separate creditor does not of itself dissolve the partnership. It, therefore, seems desirable to insert here an express provision giving the Court, at the instance of any purchaser of such share, the authority to decree a dissolution if the circumstances of the case warrant it.

Section 40. [Effect of Dissolution.] The dissolution terminates all authority in any one or more of the partners to act for the partnership, except so far as may be necessary to wind up or liquidate partnership affairs or to complete transactions begun but unfinished at the time of dissolution,—

(1) With respect to the partners, (*a*) upon the happening of the dissolution, when the dissolution is not by the act of one or more of the partners or by the death or bankruptcy of any partner; or (*b*) as declared in Section 41 of

this Act when the dissolution is by the act of one or more of the partners or by the death or bankruptcy of any partner.

(2) With respect to persons not partners, as declared in section 42 of this Act.

Section 38 of the English Act continues, as here, the authority of the partner to act for the partnership "so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution."

Section 41. [Power of Partner to Claim Contribution From Co-partners After Dissolution.] Where the dissolution is caused by the act of one or more of the partners, *or by the death or bankruptcy of a partner,* each partner, not bankrupt or deceased, is liable to his co-partners for his share of any liability created by any partner acting for the partnership to the same extent and in the same manner as if the partnership had not been dissolved, unless

(*a*) The dissolution being by act of one or more of the partners such acting partner had knowledge of the dissolution, or

(*b*) *The dissolution being by the death or bankruptcy of a partner, such acting partner had knowledge or notice of the death or bankruptcy.*

No corresponding section in the English Act. The section here submitted relates only to a partner's liability to his co-partner, where a co-partner, after dissolution, caused by the act of one of the parties or by the death or bankruptcy of a partner, makes a contract in the course of partnership business.

As worded, where the dissolution has been caused by the act of one of the parties, if the partner acting was subject to a liability to third persons, he could call on his co-partners to contribute towards this liability to the same extent as if there had been no dissolution, provided he had no knowledge of the dissolution, at the time of the act. Mere notice, not producing knowledge would not, and it is submitted should not, be sufficient. A, B and C are partners. A, in accordance with his right, or in contravention of the agreement between the partners, declares his will that the partnership should dissolve. B, subsequently, makes a contract for the partnership in ignorance of the dissolution. B should have the right to call upon A and C to assume their share of the burden. To relieve A and C of this duty to B, B ought to have more than "notice" as "notice" is defined in section 5, *supra.*

"Notice" should be, we believe, sufficient in all cases where the fact to be notified is an ordinary business fact, as notice to third persons of the dissolution of a partnership. But it is not customary for partners to dissolve a partnership at a period not previously arranged for its dissolution, without consultation with their co-partners. Such dissolution may or may not amount to a breach of a partnership contract; but, in either event, if done without

consultation, it is out of the ordinary course. This fact should not deprive the partner of a right to terminate a relationship which must necessarily depend on mutual good will and confidence; but if the partner so terminating wishes to show that he should not be required by his partners to be liable for his share of the loss due to a partnership contract made by them, he should be able to prove that they had "knowledge" of the fact at the time they made the contract that he had dissolved the partnership.

Clause (b) is a departure from the present law. [Beale's Parsons, sections 309, 310, 318, 342, 343, 351; Mechem, sections 245, 258, 259, 260, 261, 266; Collyer, sections 102, 103; 30 Cyc. 653, 670; Story, sections 265, *et seq.*, 319, 334, 336; Bates, 570, *et seq.*; Conyngton, sections 53, 72; Burdick 56; Shumaker, sections 119, 120; 3 Kent. Com. 53.] It is said that where the partnership is terminated by operation of law, *i. e.*, by death, bankruptcy, by being unlawful, or by decree of Court, every person must take notice of such facts. This statement is made generally and includes the partners. As to the partners, to whom only this provision relates, they must not expect relief if the partnership or the business is unlawful; and they have actual knowledge or notice of dissolution by decree of Court; but that they do or must necessarily have actual knowledge or notice of the death or of the bankruptcy of any one partner does not necessarily follow. Take death; to hold that a partner acting for the partnership *bona fide* in ignorance of the death of one of his co-partners must assume the entire liability, even though all other partners are ignorant of the death of the partner, and even though such deceased partner was entirely inactive and may have resided at any distance from the actual place of business, is entirely unjust to the acting partner or partners. The rule of the common law has been modified as to the law of agency. [Story on Agency (1882), 598; *Cassiday* v. *M'Kenzie*, 4 W. & S. (Pa) 282 (1842); *Clark* v. *Sykes*, section 185; Cal. C. C. section 2356; Dak. C. C. sections 1150, 1151; Md. Rev. Code (1878), 388, Art. 44, section 31; Saunder's Rev. Civ. Code of La. (1909); section 3032; S. C. Gen. Stat. (1882), section 1302; Kent. Comm. 646; Mechem on Agency, section 245; Blackwood Wright (2d Ed. Eng.) on Principal and Agent, 332, *et seq.*; English Conveyancing Act (1881), section 47; English Bankruptcy Act (1883), section 38. See Lindley, 240, *et seq.*] What has been said of the death of a partner applies also to the bankruptcy of a partner. If there are a number of partners, and one of them becomes bankrupt, and another, having no knowledge or notice of this fact, makes a contract in the ordinary course of the business, there appears no reason why he should not be able to call on his other partners, not bankrupt or deceased, to contribute towards any loss which his separate estate may sustain on account of the contract.

Section 42. [Power of Partner to Bind Partnership to Third Persons After Dissolution.] (1) After dissolution a partner may bind the partnership to third persons in the same manner and to the same extent as if the partnership had not been dissolved, except

(*a*) Where the dissolution has been caused by an event which made it unlawful for the business of the partnership to be carried on;

No corresponding provision in the English Act.

(*b*) When such third person, having had business relations with the partnership by which a credit was extended upon the faith of the partnership, has had knowledge or notice of the dissolution.

Corresponding section 36 (1) E.

This provision follows, with slight verbal changes, section 36 (2) A instead of 36 (1) E, which merely requires that "such third person" shall have "had dealings with the partnership prior to the dissolution." The provision, as written, has the support of authority. [Beale's Parsons, section 319; Mechem, section 262; Burdick, 57; 2 Bates, sections 613, 614; 30 Cyc. 671; Cal. C. C. section 2453. There is also authority for the wording of the English Act. James Parsons, sections 179, 180, 181; Lindley, 249; Pollock, 98; 3 Kent Comm. 67; Collyer, 163n; Shumaker, section 121; Mechem, 261, 262; Bates, 612, 613.]

Much can be said in favor of the principle expressed in the English Act, that a person who holds out another as his agent is bound by that agent's acts until the principal has notified all those with whom the agent has had dealings that the agency is revoked. The practical impossibility, however, of the partners knowing, by any feasible system of bookkeeping, all the persons with whom they have had dealings, unless credit has been extended, tends to support the wording here submitted.

The words "prior to dissolution" of the English Act appear to be unfortunate. A, B and C are partners. There is a dissolution. D, who has never extended a credit to the partnership, does so. The fact of dissolution is then published as provided in clause (*c*), but D has no knowledge or notice. D again extends a credit. He should, it is submitted, be able to hold the partnership.

(*c*) When such third person, not having had dealings with partnership by which a credit was extended to the partnership, either has knowledge or notice of the dissolution, or the fact of dissolution has been advertised in a newspaper of general circulation of the place (or of each place if more than one) in which the partnership business was regularly carried on.

Section 36 (2) E provides for advertisements in certain gazettes. The present section is otherwise similar to the English Act.

(2) *The liability of a bankrupt or secret and inactive partner, and the estate of a deceased partner under the preceding paragraph of this section shall be limited to his right in partnership property.*

Corresponding section 36 (3) E.

This provision follows the provisions of the corresponding section, except that any right of the deceased, bankrupt, or secret and inactive partner, which

may then exist in the partnership property shall be subject to the liability. This exception is made so as to enable any such creditor to secure satisfaction out of the partnership property and to prevent confusion as to whether such property is or is not subject to the liability. The provision is in accordance with the principle underlying section 20, *supra*, and section 44, *infra*. (See notes to those sections.)

(3) The partnership is in no case bound under the provision of this section by the acts of a partner who has become bankrupt; but this provision does not affect the liability of any person who has after the bankruptcy represented himself or consented to another to representing him as a partner of the bankrupt as declared by section 19 of this Act.

Corresponding section 38 E.

This provision amends the corresponding provision by changing "knowingly suffers himself to be represented as a partner" to read "consent to another to representing him as a partner," for the reasons set forth in the note to section 19, *supra*.

Section 43. [Effect of Dissolution on Partner's Liability.] (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

Corresponding provision 16 (2) E.

This provision is identical with the English Act. It expresses the present law. [30 Cyc. 608, 612; Beale's Parsons, section 324.]

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditors, and the person or partnership continuing the business, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors, having knowledge of the dissolution, and the person or partnership continuing the business.

Corresponding section 17 (3) E.

This provision is intended to declare more definitely the present law as declared in the corresponding provision. To this end slight verbal changes have been made. [30 Cyc., 615 Beale's Parsons, section 325, *et seq.*; Lindley, 271, *et seq.*] The partner "is discharged" instead of "may be discharged" by such an agreement. An agreement with a person continuing the business is equally effective. The course of dealing can raise a contract only where the dissolution is known.

(3) Where a person or partnership continuing the business agrees to assume all the existing liabilities of the dissolved partnership, the partners, not being engaged in continuing the business, with whom the agreement is made shall be discharged from any liability as to any person or persons who, knowing of the agreement, consent to a detrimental alteration as to the nature or time of payment thereof.

No corresponding provisions in the English Act. The subject matter is discussed [30 Cyc. 612; Beale's Parsons, 414n (1); Lindley, 252, 269, 277; Bates, sections 532, 533, 534]. It is probable that "notice" as defined in this Act might be sufficient under the present law. It is submitted that to free the partner retiring from the business from an existing liability an alteration of liability should be made after "knowledge" and not merely after "notice" of the change.

(4) The separate estate of a deceased partner shall be liable for all debts and obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

Corresponding section 9 E.

The section is similar to the corresponding section, except that the word "separate" is placed before "estate."

Section 44. [Liability of Persons Continuing the Business in Certain Cases.] (1) When one or more of the partners retire and assign (or the representatives of a deceased partner assign) their rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, who continue the business without liquidation of the partnership affairs, third persons, being creditors of the dissolved partnership, are creditors of the partnership so continuing the business.

No corresponding provision in the English Act. This and the remaining paragraphs of this section probably modify in certain cases the present law, the whole subject of the section being in doubt and confusion. The section as here presented is new to this draft, though an unsuccessful attempt to meet in part the difficulties presented was made in 39 (3) C.

Where A, B and C are partners and A assigns to B and C, who continue the business without any agreement to pay the partnership debts, under the present law the property of the first partnership becomes the property of the second partnership, but the creditors of the first partnership are not the

creditors of the second partnership, though they are the creditors of all of the members of that partnership. Such creditors, therefore, are often unable to secure satisfaction of their claims, though at the time of the assignment the partnership was solvent, and the business may have been continued by the second partnership without any notification of the change in membership. On the other hand, the creditors of the second partnership may be paid in full out of the property. The paragraph as drawn changes the law in the case supposed, and, thereby, it is submitted does away with an injustice. In making the creditors of the first partnership creditors of the second it prevents such an assignment from affecting the rights of partnership creditors in the property embarked in the business.

Again, if B and C promise to pay the debts of the partnership of A, B and C, it is uncertain whether the Court will hold that they promise as individuals or as a new partnership. If as individuals the old partnership creditors are not creditors of the new partnership. If A and B are considered as promising as a new partnership, then, whether the old partnership creditors can sue the new partnership as beneficiaries depends on the jurisdiction. The paragraph as drawn ends this uncertainty. In every case the creditors of the first partnership become creditors of the second; though, of course, they do not cease to be creditors of the first partnership. As, however, the first partnership has assigned all its property, this is of little value to such creditors, unless the assignees have promised an additional consideration beyond the payment of the debts. The status of such additional consideration is treated in paragraph (8), *infra*.

The paragraph as a whole, as well as this entire section, is based on the opinion that when there is a continuous business carried on first by A, B and C, and then by B or C, or by B and C, or by B and D, or by C and D, or by B, C and D, without any liquidation of the affairs of A, B, C, both justice and business convenience require that all the creditors of the business, irrespective of the exact grouping of the owners at the times their respective claims had their origin, should be treated alike, all being given an equal claim on the property embarked in the business.

The expression "assign their *rights in partnership property*" is used because if the word "interest" as defined under sections 31, 32 and 33, *supra*, was used, while it would include the right of the assignor in partnership property as tenant in partnership if the assignment had the consent of the other partners (see section 32b, *supra*), it would also include his share in the partnership. This section is designed to prevent the creditors of a partnership losing their rights in partnership property in certain cases where the property has been assigned by the partners. The coincidence that the partner's share in the partnership may or may not have been assigned at the same time is immaterial.

(2) Where all but one of the partners retire and assign (or the representatives of a deceased partner assign) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with one or more other persons, third persons, being creditors of the dissolved partnership, are creditors of the person or partnership so continuing the business.

No corresponding provision in the English Act.

Where all the partners assign to one partner the partnership creditors are, under this paragraph, the separate creditors of the partner continuing the business, where he continues the business alone, whether such partner promises to pay the debts of the dissolved partnership or not. If he takes one or more new partners and they continue the business with the property of the dissolved partnership, the creditors of the dissolved partnership are the creditors of the partnership continuing the business. This paragraph changes the present law to the same extent as paragraph (1).

(3) Where one or more of the partners retire or die, and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent, express or implied as a fact, of the retired partners or the representatives of the deceased partners, but without any assignment of their rights in partnership property, the rights of third persons, being creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

No corresponding provision in the English Act.

The paragraph extends the principle of the first and second paragraph of the section to the case where the business is continued by two or more of the partners, alone or with others, after the retirement or death of a partner without any formal assignment to them of the retired or deceased partner's rights in partnership property. It is submitted that in this case the neglect of the retiring partners or of the representatives of the deceased partner should not create inexecrable confusion between the creditors of the first and second partnership in regard to their respective rights in the property employed in the business; that both classes of creditors should be ahead of the claims of such retired partner or the representative of the deceased partner, and that both classes of creditors should also have equal rights in the property. This paragraph probably effects a change in the present law, though the same result is often now brought about by implying a promise to pay the debts of the dissolved partnership on the part of the person or partnership continuing the business.

(4) Where all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, third persons, being creditors of the dissolved partnership, are creditors of the person or partnership continuing the business.

No corresponding provision in the English Act.

Where the third person or persons do not promise to pay the debts of the dissolved partnership, they take prior to claims of partnership

creditors unless the assignment can be set aside as a fraud on creditors, or is effected by a Sales in Bulk Act. Where there has been a promise to pay the debts of the dissolved partnership, then, the creditors of the dissolved partnership are not only creditors of the promisor or promisors—which, in the United States, they would be as beneficiaries—but under this paragraph, if the business of the dissolved partnership is continued by a partnership, the creditors of the dissolved partnership become creditors of the partnership continuing the business, not merely the separate or joint creditors of the partners in such partnership. This paragraph expresses in general the present law.

(5) Where one or more of the partners wrongfully cause the dissolution of the partnership and the remaining partner or partners continue the business under the provisions of section 46 (2b) of this Act, either alone or with one or more third persons, without liquidation of the partnership affairs, third persons, being creditors of the dissolved partnership, are creditors of the person or partnership continuing the business.

No corresponding section in the English Act.

This paragraph extends the principle on which this section is based to a case where, the partnership having been dissolved by the wrongful act of one or more of the partners, the remaining partners exercise their right to continue the business with the property of the dissolved partnership. This paragraph probably expresses the present law.

(6) Where a partner is expelled and the remaining partner or partners continue the business either alone or with one or more third persons, without liquidation of the partnership affairs, third persons, being creditors of the dissolved partnership, are creditors of the person or partnership continuing the business.

No corresponding provision in the English Act.

This paragraph extends the principle of the section to a case where the partners have exercised a right under the agreement between the partners to expel a partner and continue the business with partnership property.

(7) The liability of any third person, being a partner in the partnership continuing the business, under the provisions of this section shall be satisfied only out of partnership property, unless the partnership continuing the business has promised, after the admission of such third person into the partnership, to pay the debts of the dissolved partnership.

No corresponding provision in the English Act.

The paragraph merely reiterates the principle of section 20, *supra*, which is that an incoming partner should be liable for the existing debts of the partnership, but that this liability should be limited to his right in partnership property. Though in cases under this section the person who joins the business on the dissoluton of the first partnership is not an incoming partner, because the first partnership is dissolved, under the circumstances his liability for the debts of the business contracted before his admission should be the same as that of an incoming partner if the confusion is to be avoided in respect to the rights in the property employed in the business, between the creditors who were creditors before he joined the business and those who became creditors afterwards.

(8) Where the business of a partnership after dissolution is continued under any of the conditions set forth in this section, the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representatives of the deceased partner, have a prior right to any claim of the retired partner or the representatives of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's share in the dissolved partnership or on account of any consideration promised for such share or for his right in partnership property.

No corresponding section in the English Act.

An illustration will, perhaps, best show the intent of the draftsmen in this paragraph. Suppose A, B and C are partners and A retires, assigning his interest in partnership property to B and C, who continue the business with the property of the dissolved partnership, promising to pay A $2000. An assignment of an interest covers the assignee's right in partnership property if the other partners consent to the assignment (see section 33, *supra*), and also the assignee's share in the partnership. For this last he may well demand a consideration. In the case put, on the subsequent failure of both partnerships under paragraph (1) of this section, the creditors of the first partnership would be also creditors of the second. By the assignment the property employed in the business would be the property of the second partnership. By his contract A would be a creditor of the second partnership for $2000; but this claim, A being insolvent, would belong under the wording of this paragraph, not to A's separate estate, but to the first partnership. This it is submitted is correct. A has sold his interest in the partnership before settling with the creditors of the partnership, and, therefore, those creditors have an equitable lien on the consideration of the sale as against the separate creditors of the retiring partner, or as against the representatives of a deceased partner who have sold the interest of their decedent to the persons continuing the business.

(9) Nothing in this section shall be held to modify any right to set any assignment aside under the provisions of section 22 of this Act.

No corresponding provision in the English Act.
This section is not intended to curtail the right of partnership creditors to attack any assignment on the ground of fraud. The paragraph is inserted to emphasize this fact.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the separate estate of the deceased partner liable for any debts contracted by such person or partnership.

Corresponding provision 14 (2) E.
The paragraph is similar to the corresponding provision.

Section 45. [Right to Liquidate.] (1) Where the partnership agreement does not provide otherwise, dissolution gives to each partner, or the personal representatives of the last surviving partner, not bankrupt, the right to liquidate the partnership affairs, except that any partner dissolving the partnership in contravention of the partnership agreement shall be entitled only to receive his share in the partnership as provided by section 46 of this Act.

(2) Provided, however, that any partner or his legal representatives, upon cause shown, may obtain liquidation by the Court.

There is no corresponding provision in the English Act. It is submitted that the persons having the right should be clearly pointed out. A bankrupt partner cannot make any contract to bind himself, and, therefore, cannot bind the partnership or act for it. When one dissolves the partnership in contravention of the agreement, he forfeits his right to act for the partnership in any manner, but is entitled to receive his share as provided by section 46, *infra*. Third persons can deal with such partner so as to bind the partnership within the scope of the authority conferred by section 42, unless they have knowledge or notice that he has no authority; but the partner is liable in damages, or to indemnify the other partners on liquidation. The other partners may restrain his actions or give notice of his want of authority.

Section 46. [Rights of Partners to Application of Partnership Property.] (1) Where dissolution of a partnership is produced in any way, except in contravention of the agreement between the partners, every partner is entitled, subject to any agreement, as against the other partners and all persons claiming

through them in respect of their interests as partners, to have the partnership property applied in payment of the liabilities of the partnership, and to have the surplus after such payment applied to the payment in cash of what may be due to the partners respectively after deducting what may be due from them as partners to the partnership, provided, however, that where the dissolution is caused by the expulsion of any partner from the business, *bona fide* in accordance with such power conferred by the agreement between the partners, if the expelled partner is discharged from all existing partnership liabilities, either by payment thereof, or by agreement to that effect as provided by section 43 (2) of this Act, he shall be entitled only to receive in cash what may be due him from the partnership.

Corresponding provision 39 E..

The provision is intended to declare the present law as declared in the English Act. Because of the recognition of a dissolution in contravention of the agreement, this provision is limited to other methods of dissolution. Because dissolution does not terminate the partnership, the words "on the termination of the partnership" are omitted. Because expulsion from the business can only take place under a power conferred by the partnership agreement (section 38, *supra*) and is, therefore, a rightful method of dissolution, special provision had to be made for such case. This part of the present draft is new. Where a partner is expelled from the business, there is no intention that the business should be wound up; nevertheless, the expelled partner should be able to terminate the agency and to discharge himself from existing liability. The first he may do by proper notice, and the last the continuing partners must effect unless they desire to have the expelled partner wind up the business by himself or by legal process.

The right to have the surplus in cash is specifically designated to avoid any possibility that a partner may claim as of right the physical partition of the property remaining after the payment of third persons.

(2) Where the partnership is dissolved in contravention of the agreement between the partners,—

(*a*) Every partner not having wrongfully dissolved the partnership shall have

I. All the rights specified in paragraph (1) of this section, and

II. The rights, as against the partner or partners who have wrongfully caused the dissolution of the partnership, to damages for the breach of the agreement.

(*b*) The partners, not having wrongfully caused the dissolution of the partnership, if they all desire to continue the business in the partnership name for the unexpired term or particular undertaking for which the partnership was formed, either by themselves or in connection with one or more third persons, shall have a right to do so, and for that purpose may possess all the partnership property, and retain for such period, as against the partner or partners who have wrongfully caused the dissolution, all his or their interest in the partnership except as provided in paragraph (3) of this section. The continuation of the business under this provision shall not deprive any partner of his right to claim damages under the second clause of paragraph (2a) of this section.

(3) Any partner who has wrongfully caused the dissolution of the partnership has done an act producing the same legal effect as an assignment to the partner or partners who have not so caused the dissolution of his interest in the partnership, except that, subject to any agreement, he has

(*a*) If the business is not continued under the provisions of paragraph (2b) of this section all the rights of a partner under paragraph (1) of this section.

(*b*) If the business is continued under paragraph (2b) of this section the right as against the other partners and all persons claiming through them in respect to their interests as partners.

I. To have the character and value of his share in the partnership ascertained and to be paid interest on advances, and to be paid the capital sum of such advances at such time or times, if any, agreed upon between the partners prior to dissolution, and in default of such agreement to be repaid such advances at once, and also to be paid an amount equal to all profits accrued at the time of dissolution, and to be paid at the termination of the term or particular undertaking for which the

partnership was formed or on the winding up of the business, whichever shall first occur: (1) any advances remaining unpaid; (2) any other amounts ascertained as part of his share in the dissolved partnership at the time of dissolution; (3) an amount equal to the profits, if any, which the Court may find attributable to the use of what was his right in the property of the dissolved partnership. If the business is continued by a partnership claims under this clause shall be treated on liquidation of such partnership as debts due a partner under the provisions of section 49 (2) of this Act; or, if the business is continued by a partner claims under this clause, on the liquidation of the affairs of such partner, shall be subject to the prior payment of all other creditors of such partner, and after all other creditors have been paid, shall be treated as debts due a partner under the provisions of section 49 (2) of this Act.

II. On the liquidation of the affairs of the person or partnership continuing the business to have the property in such business applied to the payment of the debts of the partnership of which he was a member ratably with the other debts of the person or partnership continuing the business.

No corresponding provisions in the English Act.

In these paragraphs (2 and 3) the draftsmen have attempted to make definite the rights of the partners on dissolution caused by the wrongful act of one or more of the partners. As near as may be, in view of present uncertainty, these rules express the present law. The paragraphs as a whole are based on the principle that the partners, innocent of the wrong, may retain the property of the partnership and continue the business, without being required to liquidate the affairs as if there had been no dissolution; and that the wrongdoer forfeits all his interest in the partnership except his right to take at the time of liquidation the value of his share at the time he wrongfully dissolved the partnership, and that this right shall be postponed not only to the rights of the creditors of the partnership which his wrongful act dissolved, but to those of the creditors of the partnership or partner continuing the business. The paragraphs should be read in connection with section 44.

The last sentence of (3b I) deals with the difficult situation which arises where one of two partners wrongfully dissolves and the other continues the business under clause (3b). Under section 44 (2), *supra*, the creditors of the tinuing the business. The provision here given postpones any claim of the

partner wrongfully retiring from the business to all the other creditors of the partner continuing the business, and then requires him to treat his claim as if a partnership in course of liquidation had settled all the claims of third persons. If his claim on account of capital was X dollars, and the claim of the partner continuing the business on account of capital was X dollars, and under the partnership agreement they were to share the profits equally, and the entire property of the business remaining was X dollars, the person who had wrongfully dissolved the partnership could only claim ½ X dollars.

The provision that the partner wrongfully dissolving shall be postponed *to all other creditors of the partner continuing the business* is necessary, unless we are prepared to go the length of declaring, contrary to the present law, that where one of two or more partners continues the business with the property of the partnership and without liquidation of partnership affairs, third persons, being creditors of the dissolved partnership, and the creditors of the partner continuing that business who have dealt with him in the continuation of the business, shall have priority to all other creditors of the partner continuing the business on the property employed in the business.

Section 47. [Rights of Retiring or Estate of Deceased Partner When the Business is Continued by One or More of the Partners.] When any partner retires or dies, and the business is continued by one or more of the other partners alone or associated with third persons without any settlement of accounts as between him or his estate and the person or partnership continuing the business, in the absence of any agreement to the contrary, except where the business is continued under the provisions of section 46 (2b) of this Act, he or his legal representatives are entitled as against such persons or partnership to have the value of his share at the date of dissolution of the dissolved partnership ascertained, and to receive as an ordinary creditor an amount equal to the value of his share in the dissolved partnership with interest, or, at his option or the option of his legal representatives, in lieu of interest, to receive the profits that the Court may find attributable to the use of his right in the property of the dissolved partnership.

Provided that the creditors of the dissolved partnership, as against the separate creditors of the retired or deceased partner, or the representatives of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by Section 44 (8) of this Act.

Corresponding section 42 (1) E.

Where, on the retirement or death of a partner, the affairs of the partnership have been so far settled that the debts due third persons are liquidated, the section here presented produces the same effect as the correspond-

ing provision of the English Act, although differently expressed, because of the definite meanings in this draft attached to such words and expressions as "profits," "partnership property," "interest," and "share" in partnership, and "right" in partnership property. As the rights of the partner wrongfully dissolving the partnership where the business is continued by the other partners are fully covered by section 46 (3b), *supra*, such partner is expressly excluded from the provisions of this section.

The proviso, which is new to this draft, and which is not found in the English Act, carries out the principle expressed in section 44 (8), *supra*, and should be read in connection with that section.

Section 48. [Rights Where Partnership is Dissolved for Fraud or Misrepresentation.] Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a*) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital contributed by him; and

(*b*) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(*c*) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

Corresponding section 41 E.

This section is identical with the corresponding section except that the expression "partnership property" instead of "partnership assets" is used, the latter expression having under section 49, *infra*, a wider scope than here intended, and the words *"after all liabilities to third persons have been satisfied"* have been added to avoid a possible confusion on this subject.

Section 49. [Rules for Liquidation.] In the settling of accounts between the partners after a dissolution of the partnership, the following rules shall be observed subject to any agreement, but such agreement shall not affect the rights of persons other than parties or privies thereto.

Corresponding section 44 E.

Identical with English Act, except that the clause in relation to third persons is added.

(1) The assets of the partnership are:

(*a*) The partnership property;

(*b*) The contributions of the partners necessary for the payment of all the liabilities specified in paragraph (2) of this section.

No corresponding provisions in the English Act.

The paragraph is inserted to avoid the present confusion as to whether the contributions of the partners towards the losses of the partnership is a partnership asset or not. [See *in re* Bertenshaw, 157 Fed. 303 (1907); *in re* Forbes, 128 Fed. 137 (1904); *Barry* v. *Foyles*, 1 Pet. 311 (182); *West* v. *Lea*, 174 U. S. 590 (1899); *Vaccara* v. *Bank*, 103 Fed. 436 (1900); *in re* Mercur, 122 Fed. 384 (1903).] That such contributions are assets appears to be supported by the better reasoning. [*In re* Forbes.]

(2) The liabilities of the partnership shall rank in order of payment as follows:

(*a*) That due to creditors other than partners.

(*b*) That due the partners other than for capital and profits.

(*c*) That due the partners in respect of capital.

(*d*) That due the partners in respect of profits.

Corresponding provisions 44 (b, 1, 2, 3, 4) E.

Identical in results though differently expressed than the corresponding sections.

(3) The assets shall be applied to the satisfaction of the foregoing liabilities in the order of their declaration in paragraph (1) of this section.

No corresponding provision in the English Act.

(4) The partners shall contribute, as provided by section 26 (1) of this Act, to the whole amount, if any, necessary to satisfy the foregoing liabilities; but if one or more, but not all of the partners are insolvent, or, not being subject to process, refuse to contribute, the solvent partners subject to process shall contribute the amounts which they would have had to contribute to pay the foregoing liabilities had all the partners contributed; and also

in the relative proportions in which they share the profits the additional amount, if any, needed to pay all the foregoing liabilities.

Corresponding section 44 (a) E.
This provision is similar to the corresponding provision in that it provides for sharing the losses in proportion to the share in the profits. It also provides for the contingency that one or more but not all of the partners may be insolvent or not subject to process. As drawn the provision is intended to express as nearly as may be the present law. [30 Cyc. 692.] While there is no such provision in the English Act, the English common law appears to be to the same effect [*Sedgwick* v. *Daniel* 2 H. & N. 321; *Ex parte* Hunter, Buck 552; *Ex parte* Moore, 2 Gl. & J. 172; *Ex parte* Plowden, 2 Deac. 456, 3 M. & A. 402; *Nowell* v. *Nowell*, L. R. 7 Eq. 538]. In *Garner* v. *Murray* (1904), 1 Ch. 60, it was held that the partner, under the wording of the English Act, was not liable to make up the deficiency of capital caused by the insolvency of one of the partners.

(5) The assignee for the benefit of creditors, or any person appointed by the Court, shall have the right to enforce the contributions specified in paragraph (4) of this section.

No corresponding provision in the English Act.

(6) Any partner, or his legal representatives, shall have the right to enforce the contributions specified in paragraph (4) of this section, to the extent of the amount which he has paid in excess of his share of the liability.

No corresponding provision in the English Act.

(7) When partnership property and the separate properties of the partners are in the possession of a Court for distribution, partnership creditors shall have priority on partnership property and separate creditors on separate property, saving the rights of lien or secured creditors as heretofore.

No corresponding provisions in the English Act.
The method of distribution is that directed by the Philadelphia meeting of the Committee. It represents the generally prevailing American Law as expressed in the Federal Bankrupt Act.

(8) Where a partner has become bankrupt the claims against his separate property shall rank in the following order:

(*a*) Those due to separate creditors.

(*b*) Those due to partnership creditors.

(*c*) Those due to partners by way of contribution.

No corresponding provision in the English Act.
This provision follows the direction of the Committee.

Section 50. [Accrual of Actions.] Subject to any agreement between the partners the amount due from the liquidating partners or the surviving partners or the person or partnership continuing the business to the other partners or the representatives of a deceased partner in respect to their shares in the partnership is a debt due at the time an account is stated as to all matters covered by the account.

Corresponding section 43 E.
The draftsmen have abandoned the attempt made in 45 C to cover in this section the right to an account, that subject in this draft being fully treated in section 29, *supra*. They have also decided that it is not desirable to treat of the accrual of actions against the retired partner or the estate of a deceased partner. The section as here drawn differs from the corresponding section of the English Act in two particulars. That Act probably covers only what is due from surviving partners to the estate of a deceased partner, or to a partner from the partners continuing the business. Again, the English Act makes the debt due at the time of dissolution. The provision of the section as here drawn is based on the principle that where one person manages property for another nothing is due until an account is stated. Section 29, *supra*, safeguards the right of the retired partners or their representatives by giving them the right on dissolution, or whenever circumstances have arisen which render it just and reasonable that an account should be granted, to demand and secure an account.

PART VII.

PROCEDURAL SECTIONS.

The procedural and remedial part of the law as affecting partnerships is in a highly unsatisfactory condition in many States and as among the various States. In view of the present movement for procedural reform and of the fact that present difficulties are not inseparably related to partnership law, by direction of the Committee, these sections are presented in a separate part of the Act. It is intended that while this part of the Act shall be recommended by the Conference to the various States, it shall be distinctly understood that any State may adopt the Act, omitting this part, without violating the principle of uniformity.

A study of the statutes of the various States and the English Orders has led to the belief that the following procedure will best promote justice and eliminate the present uncertainty in the laws of many States. The section concerning the rights of a separate judgment creditor in a partner's share by way of attachment or execution is retained in the general body of the Act because it is believed that no one State now possesses an equally expedient and satisfactory procedure, and because it is a necessary part of the Act if section 32 (1c) is adopted, else there might be in many States under existing statutes no way for the separate creditor to get at his debtor's share in a partnership.

Section 51. [Actions By or Against the Partners.] (1) Proceedings [in law or in equity] may be brought by or against a partnership in the name of (*a*) *the partnership,* (*b*) *the partnership and one or more of the partners,* or (*c*) all the partners jointly as a partnership. Where the partners are sued in the partnership name, they shall appear individually in their own names; but all subsequent proceedings shall nevertheless continue in the partnership name, except that the judgment or decree shall be entered in the partnership name and the names of all partners who have appeared or been served as parties defendant.

No corresponding provisions; but see English Supreme Court Rules, *infra.*

Such proceedings now exist in many jurisdictions. [English Supreme Court Rules, Order XLVIII A (Lindley, 885); Civil Code of Ala. (1907), section 2506; Iowa Code (1897), section 3468; Cal. C. C., sections 338, 414; Tenn. Code (1896), section 4484; S. Dak., pp. 341, 405 (1905 and 1909); Minn. Rev. Laws, section 4282; W. Va. Code (1906), section 3787; Rev. Code of Mont. (1907), section 6497; Cobbey's Comp. Stat. of Neb. (1907), section 1023; Mo. Anno. Stat. (1906), section 892; Bates Anno. St. of Ohio, section 5011; Compiled Laws of Utah (1907), section 2927; Wis. Statutes (1898), section 2612; Wyo. Rev. Stat. (1899), section 3485; Ga. C. C. (1895), sections 5346, 2638.]

Under the present provision, the partnership name is merely a convenient designation of all the partners, no third or fictitious legal person being implied. The difficulties as to the existence of a separate and distinct entity and its citizenship for the purpose of Federal jurisdiction on the ground of diverse citizenship are avoided by the requirement that the "partners" shall appear individually in their own names. [*Great Southern* v. *Jones,* 177 U. S. 449, 454 (1900); *Macey* v. *Macey,* 135 Fed. 725 (1905); *Saunders* v. *Adams Express,* 136 Fed. 494 (1905); *Bruett* v. *Austin Co.,* 174 Fed. 668 (1909).]

Care must be taken even under this provision not to sue in the partnership name where the partnership has its entire existence in another State and only one or more partners reside within the jurisdiction; for such a judgment or decree is not binding in that other State upon the partnership property or the other partners. [*Russell* v. *Combefort,* 23 Q. B. D. 526 (1889); *Western Bank* v. *Perez* (1891), 1 Q. B. 304, 314; 1 Locke, Burney and Strange Annual Practice (Eng., 1910), 696-714; Freeman on Judgments, sections 120a, 232, 233, 359a; Black on Judgments, 23 Cyc. 684, 690, 693; Lindley, 301, 302.]

In a number of the States action may now, by statute, be brought against any one or more of the partners as well as against the partnership in the partnership name. The draftsmen have failed to find any case in which, where one or more partners had been sued by a partnership creditor, an action was thereafter permitted against the partnership in the partnership name or against all the partners jointly. They believe that no such case does exist and that no such action should be permitted, for thereby the partner already sued is made subject to a second action arising out of the same cause, a thing which the law has consistently refused.

(2) Where a judgment or decree for the payment of money has been obtained under paragraph (1) of this section, it shall be satisfied out of the partnership property and the separate property of those partners only who have appeared as defendants or been served with process.

No corresponding provision in the English Act but see note to paragraph (1) of this section.

This is merely a declaration of the present law as developed by statute and decision [23 Cyc. 1240, 1245, 1266, 1375].

(3) Where the separate property of one or more of the partners or the estate of a deceased partner, has not been bound by a judgment or decree under the foregoing provisions, the party claiming such right may:

(*a*) With leave of Court, summon such partner or partners or the personal representatives of any deceased partners to show cause why he or they or the decedent's estate should not be bound by the judgment or decree in the same manner as though they or the deceased partner had

been originally parties to the proceedings and served with process. The summons must describe the judgment or decree and be accompanied by an affidavit stating that the whole or a part of the judgment or decree remains unsatisfied and specifying the amount due thereon. The defendant in his answer may deny the judgment or decree or his liability, upon the obligation upon which the judgment was recovered; or set up any defense which may have arisen subsequently, except a discharge from liability by the statute of limitations. The issues formed by these pleadings, subject to amendment, shall be determined as in other cases, but the judgment or decree shall be only for the amount of the original judgment remaining unsatisfied with interest thereon; or

(*b*) Bring a separate proceeding for the unsatisfied amount of the original judgment or decree against any or all such partners or the personal representatives of any deceased partners. The facts specified in this provision as well as the facts constituting the cause of action shall be set forth in the complaint, but the judgment or decree shall be only for the unsatisfied amount of the original judgment or decree with interest thereon.

No corresponding provision in the English Act.

Sub-paragraph (*a*), as drawn, is intended to facilitate justice by enabling the entire matter to be settled in one action, if possible. It is based upon Cal. Civ. Pro., sections 989-994; 2 Idaho Rev. Codes, sections 4860-4865; N. Y. C. P., sections 1932-1947; 2 S. Dak. Comp. Laws, p. 405, sections 466-471; Colby's Comp. Stat. of Neb., section 1084; N. C. Rev. Laws (1905), sections 455-459. Rules of the Eng. Supreme Court, Order XLVIII A (8) [Lindley, 885]. The constitutional provisions against special legislation, as in Pennsylvania [Const., section 3 cl. 7], may cause difficulty; but this is doubtful. [*Portland Cement Co.* v. *Allison*, 220 Pa. 382 (1908); *Paving Co.* v. *Rapid Transit Co.*, 220 Pa. 603 (1908); *Lumber Co.* v. *Carnegie Institute*, 225 Pa. 486 (1909).]

(4) At any time before trial, any partner or party interested, by petition to the Court, may intervene as party plaintiff or defendant with the partnership or be made such by the petition of any party to the cause. In any proceeding, by or against the partnership, on petition of the opposing party, the Court may

order the partnership or their attorneys to furnish the names and addresses of the persons who were, at the time of the cause of action, interested as partners in such manner and verified on oath or otherwise as the Court may direct. If, as plaintiffs in the suit, the partnership or their attorneys shall fail to comply with such order all proceedings in the action may, upon application for that purpose, be stayed upon such terms as the Court may direct.

No corresponding provisions.

This provision follows the present law for the intervention of parties. The draft is based upon the English Supreme Court Rules, Order XLVIII [Lindley, 885; *Abraham & Co.* v. *Dunlop* (1905), 1 K. B. 49.] The words "by petition of any opposing party," of draft C, have been changed to read "by petition of any party to the cause," so as to include parties plaintiff, defendant, or garnishee.

(5) Process against the partnership for the purpose of binding partnership property shall be served, either upon any one or more of the partners, or upon any agent of the partnership having at the time of service control or management of the partnership business at the principal place of business within the jurisdiction. At the time of service a written statement shall also be served on such person stating whether he is served as a partner or as an agent or in both capacities and, in default of the service of such statement, the person served shall be deemed to be served as a partner. A person served as a partner may appear specially for the purpose of denying that he is a partner.

No corresponding provision in the English Act.

This provision is based upon English Supreme Court Rules, Order XLVIII A (3-8). It modifies the present law in that it provides for service upon an agent good as to joint property, but not good against the separate property of any one partner; and in permitting a person to appear for the purpose of denying that he is a partner, without thereby appearing as a party defendant.

(6) Where judgment has been obtained under the provisions of paragraph (1) of this section and execution has issued thereon, levy may be made upon all the property bound by the judgment; *but, before satisfaction may be had out of the separate property of any partner, sale shall be made of any apparent partnership property within jurisdiction of the court which has entered the*

judgment, not claimed by a partner or his legal representatives to be separate property.

No correspondng provisions in the English Act.

The results produced are as follows: (*a*) Where the suit is in the partnership name, or the names of all the partners jointly as a partnership, and service is made on an agent only, and no partner defends, the levy and sale can be on partnership property only. (*b*) When one or more partners are served or appear, the judgment binds the partnership property and the property of these partners; levy may be made on all such property; but satisfaction must be had as provided. This method of securing satisfaction is the only change introduced into the present law.

Though the last part of this paragraph met with considerable criticism at the Philadelphia meeting of the Committee, the draftsmen believe it is a justifiable change in the law and that a careful consideration will so prove. It enables a partner and his legal representatives to protect his separate estate by preventing a partnership creditor from arbitrarily selling his separate property when there is sufficient apparent and admitted partnership property within the reach of the process to satisfy the judgment. It in no way destroys the reward of the creditor's diligence for no other creditor, whether separate or partnership, can affect the priority of his lien. The additional costs imposed would be taxed on the judgment.

(7) The liability of a person liable as a partner by estoppel may be enforced under the provisions of this section in the same manner as though he were a partner in fact.

No corresponding provisions in the English Act.

This paragraph is inserted under the theory stated in the note to section 19, *supra.*

Section 52. Process for any order upon the application of any separate judgment creditor of a partner as provided by section 35 of this Act for the charging of a partner's share in a partnership with the satisfaction of the judgment of separate creditor of the partner shall be served on the judgment debtor and his partenrs or such of them as are within the jurisdiction, and such service shall be a good service on all the partners. Process on the application of any partner shall be served on the judgment creditor and the other partners or such of the other partners within the jurisdiction as shall not concur in the application; such service shall be a good service on all partners. All orders made on such process shall be served in like manner and with like effect.

No corresponding provision in the English Act.

This provision is taken from the English Supreme Court Rules, Order XLVIrr. 1a and 1b. [Lindley, 393.] It has application only to the charging order provided for in section 35 of this Act.

UNIFORM WORKMEN'S COMPENSATION ACT

APPROVED BY

CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

AND RECOMMENDED FOR ADOPTION

IN ALL THE STATES

OCTOBER
1914

CHARLES THADDEUS TERRY
PRESIDENT
100 BROADWAY, NEW YORK, N.Y.

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COMPENSATION ACTS IN THE UNITED STATES.

Arizona.	L. 1912, c. 14.
California.	L. 1911, c. 399; largely superseded by L. 1913, c. 176.
Connecticut.	L. 1913, c. 138.
Illinois.	L. 1913 (c. 40, R.L.), House Bill 841.
Iowa.	L. 1913, c. 147.
Kansas.	L. 1911, c. 218; amended by L. 1913, c. 216.
Kentucky.	L. 1914, c. 73.
Louisiana.	L. 1914, Act No. 20.
Maryland.	L. 1914, c. 800.
Massachusetts.	L. 1911, c. 751; amended by L. 1912, cs. 172, 571, 666; L. 1913, cs. 445, 448, 568, 696, 746, 807, 813; L. 1914, cs. 338, 636, 708.
Michigan.	L. 1912, Act No. 10, amended by L. 1913, Acts Nos. 50, 79, 156, 259.
Minnesota.	L. 1913, c. 467.
Nebraska.	L. 1913, c. 198.
Nevada.	L. 1911, c. 183; amended by L. 1913, c. 111.
New Hampshire.	L. 1911, c. 163.
New Jersey.	L. 1911, c. 95; amended by L. 1912, c. 368; L. 1913, cs. 145, 174, 177, 301.
New York.	L. 1914, c. 41, amended by L. 1914, c. 316, is c. 67, C.L.
Ohio.	L. 1911, c. 251, amended by L. 1913, Senate Bills 48, 137, is c. 28B Gen. Code of 1910.
Oregon.	L. 1913, c. 112.
Rhode Island.	L. 1912, c. 831, amended by L. 1913, cs. 936, 937.
Texas.	L. 1913, c. 179.
Washington.	L. 1911, c. 74, amended by L. 1913, c. 148.
West Virginia.	L. 1913, c. 10.
Wisconsin.	L. 1911, c. 50, amended by L. 1913, c. 599.

Compulsory Act.

[For elective provisions see Appendix.]

UNIFORM WORKMEN'S COMPENSATION ACT.

APPROVED BY CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, OCTOBER, 1914.

An act to make uniform the law relating to compensation to employees for personal injuries sustained in the course of their employment.

Note. — In some states a more descriptive title will be required.

Be it enacted, etc., as follows:

I.

RIGHTS AND REMEDIES GRANTED AND AFFECTED.

EMPLOYMENTS COVERED.

SECTION 1. This act shall apply to all public and all industrial employment, as hereinafter defined. If a workman receives personal injury by accident arising out of and in the course of such employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified.

Note. — "Industrial employment." These words, as defined in section 90 (*e*), are used for the purpose of excluding ordinary domestic servants and the ordinary employees of charitable organizations. Similar provisions are found in the following:

California. L. 1913, c. 176, sec. 51, cl. (1):

"but shall not include any place where persons are employed

solely in farm, dairy, agricultural, viticultural, or horticultural labor, or in stock or poultry raising, or in household domestic service."

Iowa. L. 1913, c. 147, sec. 1:

"shall not apply to any household or domestic servant, farm, or other laborer engaged in agricultural pursuits." Also section 17, cl. (*h*), "for the sake of pecuniary gain."

Kansas. L. 1913, c. 216, sec. 6:

In "employer's trade or business," but not including agricultural pursuits.

Kentucky. L. 1914, c. 73, sec. 14:

"shall not apply to employers of employees in domestic or agricultural service."

Massachusetts. L. 1911, c. 751, part I, sec. 2:

Not including "domestic servants and farm laborers."

Michigan. L. 1912, No. 10, part 1, sec. 2:

Not including "household domestic servants and farm laborers."

Nebraska. L. 1913, c. 198, sec. 15, cl. (3):

"not for the purpose of gain or profit."

Nevada. L. 1913, c. 111, sec. 43:

"except domestic servants and farm laborers."

New York. L. 1914, c. 41, sec. 3 (4):

"and shall not include farm laborers or domestic servants."

Rhode Island. L. 1912, c. 831, sec. 2:

Not including "domestic service or agriculture."

Texas. L. 1913, c. 179, sec. 2:

shall not apply to "domestic servants or farm laborers."

West Virginia. L. 1913, c. 10, sec. 9:

shall not apply to "employes in domestic or agricultural service."

The words "by accident" are used so that the employee can recover by suit full damages for injuries caused by assault or wilful intention of employer.

Cf. Arizona. L. 1912, c. 14, sec. 1.
California. L. 1913, c. 176, sec. 12.
Illinois. L. 1913 (c. 40, R.L.), sec. 1.
Kansas. L. 1913, c. 216, sec. 1.
Maryland. L. 1914, c. 800, sec. 14.
Minnesota. L. 1913, c. 467, sec. 1.
Nebraska. L. 1913, c. 198, secs. 1, 10.
New Hampshire. L. 1911, c. 163, sec. 2.
New Jersey. L. 1911, c. 95, sec. 1.
New York. L. 1914, c. 41, sec. 3 (7).
Oregon. L. 1913, c. 112, sec. 12.
Rhode Island. L. 1912, c. 831, sec. 1.
Wisconsin. L. 1913, c. 559, sec. 2394–3.

"his employer shall pay." The following states have adopted compulsory workmen's compensation acts:

California. L. 1913, c. 176, sec. 12.
Maryland. L. 1914, c. 800, sec. 14.
New York. L. 1914, c. 41, secs. 10, 50.
Ohio. L. 1913, c. 000, sec. 21.
Washington. L. 1911, c. 74, sec. 4.

The constitutionality of workmen's compensation laws of various kinds has been considered in the following cases:

Ives v. *So. Buffalo Ry. Co.*, 201 N.Y. 271.
State, ex rel., v. *Clausen*, 65 Wash. 156.
Borgnis v. *Falk*, 147 Wis. 327.
State v. *Creamer*, 85 Ohio St. 349.
Sexton v. *Newark Tel. Co.*, 84 N.J. L. 85.
Affirmed by appellate court July 10, 1914.
Cunningham v. *Northwestern Improvement Co.*, 44 Mont. 180.
Mondou v. *Railroad Co.*, 223 U.S. 1.
Opinion of the Justices, 209 Mass. 607.

STATE AND MUNICIPAL BODIES.

SECTION 2. This act shall apply to employees (other than officials as hereinafter defined) of the state, and all counties, cities, towns, and other public corporations, within the state. Policemen and firemen and others entitled to pensions shall be deemed employees within the meaning of this act. If, however, any policeman or fireman or other person entitled to a pension claims compensation under this act there shall be deducted from such compensation any sum which such policeman or fireman or other person may be entitled to receive from any pension or other benefit fund to which the state or municipal body may contribute.

Note. — In the following states public employees are included:

California. L. 1913, c. 176, sec. 13.

Connecticut. L. 1913, c. 138, part B, sec. 43:

"the state and any public corporation within the state."

Illinois. L. 1913 (c. 40, R.L.), secs. 4, 5.

Iowa. L. 1913, c. 147, sec. 17.

Louisiana. L. 1914, c. 30, sec. 1.

Maryland. L. 1914, c. 800, sec. 34:

excludes those who are as well provided for.

Michigan. L. 1912, No. 10, part V, secs. 5, 7.

Nebraska. L. 1913, c. 198, sec. 6:

"the state and every governmental agency created by it."

Nevada. L. 1913, c. 111, sec. 1.
New Jersey. L. 1913, c. 145.
New York. L. 1914, c. 41, sec. 3 (3).
Ohio. L. 1913, c. 28 B, secs. 13, 14.
Washington. L. 1911, c. 74, sec. 17.
Wisconsin. L. 1913, c. 599, sec. 2394–4.

The words "other than officials" are defined in section 90 (*e*). They or similar words are used in the following:

Illinois. L. 1913 (c. 40, R.L.), sec. 5, cl. First.
Iowa. L. 1913, c. 147, sec. 17 (*b*).
Massachusetts. L. 1913, c. 807, sec. 1.
Michigan. L. 1912, No. 10, part 1, sec. 7.
Minnesota. L. 1913, c. 467, sec. 34 (*g*) (1).
Nebraska. L. 1913, c. 198, sec. 15 (1).
New Jersey. L. 1913, c. 145, sec. 1.
Ohio. L. 1913, c. 000, sec. 1465-61 (1).
Wisconsin. L. 1913, c. 599, sec. 2394-7, cl. (1).

"Policemen and firemen." For similar provision see:

Ohio. L. 1913, c. 000, sec. 1465-61.
Wisconsin. L. 1913, c. 599, sec. 2394-7, cl. (1).

INJURIES NOT COVERED.

SECTION 3. No compensation shall be allowed for an injury caused (1) by the employee's wilful intention to injure himself or to injure another, or (2) by his intoxication. If the employer claims an exemption or forfeiture under this section the burden of proof shall be upon him.

Note. — "Wilful intention to injure himself." This language is used in substance in —

Iowa. L. 1913, c. 147, sec. 2.
Kentucky. L. 1914, c. 73, sec. 36.
Louisiana. L. 1914, No. 20, sec. 18.
Nevada. L. 1913, c. 111, sec. 2.
New York. L. 1914, c. 41, sec. 10.
Ohio. L. 1913, c. 000, sec. 21.
Oregon. L. 1913, c. 112, sec. 22.
Washington. L. 1911, c. 74, sec. 6.
West Virginia. L. 1913, c. 10, sec. 28.
Wisconsin. L. 1913, c. 599, sec. 2394-3.

"by his intoxication." This provision is found in —

California. L. 1913, c. 176, sec. 12, cl. (3).
Connecticut. L. 1913, c. 138, part B, sec. 1.
Iowa. L. 1913, c. 147, sec. 2, cl. (*a*).
Kansas. L. 1911, c. 218, sec. 1.
Kentucky. L. 1914, c. 73, sec. 36.
Louisiana. L. 1914, No. 20, sec. 28.
Maryland. L. 1914, c. 800, secs. 14, 15.
Nebraska. L. 1913, c. 198, secs. 9, 52.
Nevada. L. 1913, c. 111, sec. 2.
New Hampshire. L. 1911, c. 163, sec. 3.
New Jersey. L. 1911, c. 95, sec. 7.
Rhode Island. L. 1912, c. 831, part II, sec. 2.
West Virginia. L. 1913, c. 10, sec. 28.

The words "serious and wilful misconduct," or similar words which are construed as including intoxication, are used in —

Kentucky. L. 1914, c. 73, sec. 36.
Maryland. L. 1914, c. 800, sec. 45.
Massachusetts. L. 1911, c. 751, part II, sec. 2.
Michigan. L. 1912, No. 10, part II, sec. 2.

RIGHT TO COMPENSATION EXCLUSIVE.

SECTION 4. The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.

Employers, who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under this act shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of

such employment; and all contracts of hiring in this state shall be presumed to include such an agreement.

LIABILITY OF THIRD PERSONS.

SECTION 5. When any injury for which compensation is payable under this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this act or obtain damages from or proceed at law against such other persou to recover damages; and if compensation is claimed and awarded under this act any employer having paid the compensation or having become liable therefor shall be subrogated to the rights of the injured employee to recover against that person, provided, if the employer shall recover from such other person damages in excess of the compensation already paid or awarded to be paid under this act, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action.

California. L. 1913, c. 176, sec. 31, all in excess of compensation to be held for employee.

Connecticut. L. 1913, c. 138, sec. 6, all except expenses and costs to go to employee.

Illinois. L. 1913, c. 40, sec. 29, all except expenses and costs to go to employee.

Massachusetts. L. 1913, c. 448, sec. 1, four fifths of excess to go to employee.

Texas. L. 1913, c. 179, part II, sec. 6, for the benefit of the employer.

Wisconsin. L. 1913, c. 599, sec. 2394–25, all for the employer.

CONTRACTING OUT FORBIDDEN.

SECTION 6. No contract, rule, regulation, or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this act.

Note. — "Contracting out forbidden." This is a usual provision.

Cf. California. L. 1913, c. 176, sec. 32.
Illinois. L. 1913 (c. 40, R.L.), sec. 23.
Iowa. L. 1913, c. 147, secs. 8, 19.
Massachusetts. L. 1911, c. 751, part II, sec. 20.
Michigan. L. 1912, No. 10, part II, sec. 20.
Nevada. L. 1913, c. 111, secs. 29, 43.
Ohio. L. 1913, c. 000, sec. 47.
Rhode Island. L. 1912, c. 831, part II, sec. 22.
Texas. L. 1913, c. 179, sec. 14.
Washington. L. 1911, c. 74, sec. 11.
West Virginia. L. 1913, c. 10, sec. 23.

II.

COMPENSATION.

DEATH BENEFITS.

SECTION 7. If death results from the injury within [ ] years, the employer or the insurance carrier shall pay to the persons entitled to compensation or, if there are none, then to the personal representative of the deceased employee, burial expenses not to exceed [ ] dollars; and shall also pay to or for the following persons for the following periods a weekly compensation equal to the following percentages of the deceased employee's average weekly wages as defined in section 15:

(*a*) To the dependent widow or widower, if there be no dependent children, [ ] per cent.

(*b*) To the dependent widow or widower, if there be one or two dependent children, [ ] per cent; or if there be three or more dependent children, [ ] per cent. Such compensation to the widow or widower shall be for the use and benefit of such widow or widower and of the dependent children, and the Industrial Accident Board may from time to time apportion such compensation between them in such way as it deems best.

(*c*) If there be no dependent widow or widower, but a dependent child or children, then to such child or children [ ] per cent, with [ ] per cent additional for each child in excess of two, with a maximum of [ ] per cent, to be divided equally among such children if more than one.

(*d*) If there be neither dependent widow, widower, nor child, but there be a dependent father or mother, then to such parent, if wholly dependent [ ] per cent, or if partially dependent [ ] per cent, or if both parents be dependent then one half of the foregoing compensation to each of them; or, if there be no such parents, but a dependent grandparent, then to every such grandparent the same compensation as to a parent.

(*e*) If there be neither dependent widow, widower, child, parent, or grandparent, but there be a dependent grandchild, brother, or sister, or two or more of them, then to such dependents [ ] per cent for one such dependent and [ ] per cent additional for each additional such dependent, with a maximum of [ ] per cent, to be divided equally between such dependents if more than one.

NOTE. — *Brackets.* In all cases where brackets appear it is intended that words and figures shall be inserted as may best suit local sentiment and conditions. Assistance in filling the gaps may be had by consulting the notes which follow many of the sections.

Note. — "If death results . . . within [ ] years." In the following states this limitation is as follows:

Arizona. L. 1912, c. 14, sec. 8, cl. 3, within 6 months.
Connecticut. L. 1913, c. 138, sec. 9, within 2 years.
Kentucky. L. 1914, c. 73, sec. 42, within 2 years.
Louisiana. L. 1914, No. 20, sec. 8 (*e*), within 1 year.
Maryland. L. 1914, c. 800, sec. 35, within 2 years.
New York. L. 1914, c. 41, sec. 16, no time limit.
Ohio. L. 1913, c. 000, sec. 35, within 2 years.
West Virginia. L. 1913, c. 10, sec. 33, within 90 days.

DEPENDENTS.

SECTION 8. The following persons, and they only, shall be deemed dependents and entitled to compensation under the provisions of this act:

A child if under [ ] years of age, or incapable of self-support and unmarried, whether ever actually dependent upon the deceased or not.

The widow only if living with the deceased, or actually dependent, wholly or partially, upon him.

The widower only if incapable of self-support and actually dependent, wholly or partially, upon the deceased at the time of her injury.

A parent or grandparent only if actually dependent, wholly or partially, upon the deceased.

A grandchild, brother, or sister only if under [ ] years of age, or incapable of self-support, and wholly dependent upon the deceased. The relation of dependency must exist at the time of the injury.

Note. — "At the time of the injury." This provision is contained in the following:

Connecticut. L. 1913, c. 138, sec. 9.
Illinois. L. 1913 (c. 40, R.L.), sec. 7.
Iowa. L. 1913, c. 147, secs. 10, 17, cl. (*c*).
Kansas. L. 1913, c. 216, sec. 9, cl. (*j*).
Louisiana. L. 1914, No. 20, sec. 8 (*e*).
Massachusetts. L. 1911, c. 751, part II, sec. 6.
Michigan. L. 1912, No. 10, part II, sec. 5.
Nevada. L. 1913, c. 111, sec. 26, cl. (5).
Rhode Island. L. 1912, c. 831, part II, sec. 6.
West Virginia. L. 1913, c. 10, sec. 33, cl. (3).
Wisconsin. L. 1913, c. 559, sec. 2394-10, cl. 5.

The date as of which the dependents shall be determined is of great importance. If the date of death is taken there is opportunity for fraud. An injured employee who is unmarried and has what amounts to a pension which will go to his widow, if he leaves one, is likely to get married. So also an injured employee who is liable to die may assume, in whole or in part, the support of various relatives who may be considered dependents at the date of his death.

PERIODS OF COMPENSATION.

SECTION 9. The compensation herein provided for shall be payable during the following periods:

To a widow, until death or remarriage, but in no case to exceed [ ] weeks.

To a widower, during disability or until remarriage, but in no case to exceed [ ] weeks.

To or for a child, until [ ] years of age, but in the case of a child incapable of self-support and unmarried as long as so incapable, but in no case

to exceed [ ] weeks beyond said age of [ ] years.

To a parent or grandparent, during the continuation of a condition of actual dependency, but in no case to exceed [ ] weeks.

To or for a grandchild, brother, or sister, during dependency as hereinbefore defined, but in no case to exceed [ ] weeks.

Upon the cessation of compensation under this section to or on account of any person, the compensation of the remaining persons entitled to compensation for the unexpired part of the period during which their compensation is payable shall be that which such persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death.

Note. — "but in no case to exceed [ ] weeks." In the following states the limit is —

Arizona. L. 1912, c. 14, sec. 8, cl. 3, not over $4000.

California. L. 1913, c. 176, sec. 15, cl. (*c*), not over $5000.

Connecticut. L. 1913, c. 138, part B, sec. 9, not over $10 for 312 weeks.

Illinois. L. 1913 (c. 40, R.L.), sec. 7, not over $3500.

Iowa. L. 1913, c. 147, sec. 10, not over $10 for 300 weeks.

Kansas. L. 1913, c. 216, sec. 11, not over $3600.

Kentucky. L. 1914, c. 73, sec. 42, 6 years, but not more than $3750, nor less than $1500.

Louisiana. L. 1914, No. 20, sec. 8 (*e*), 300 weeks, but not over $3000, nor less than $900.

Massachusetts. L. 1911, c. 751, part II, sec. 6, not over $10 for 300 weeks.

Michigan. L. 1912, No. 10, part II, sec. 5, $10 for 300 weeks.

Minnesota. L. 1913, c. 467, sec. 14, cl. (17), $10 for 300 weeks.

Nebraska. L. 1913, c. 198, sec. 22, not over 350 weeks.

Nevada. L. 1913, c. 111, sec. 25, 100 months, but not over $5000.

New Hampshire. L. 1911, c. 163, sec. 6, $3000.

New Jersey. L. 1911, c. 95, sec. 12, 300 weeks, but not over $3000.

Ohio. L. 1913, c. 000, sec. 35, 6 years, but not over $3750.

Rhode Island. L. 1912, c. 831, sec. 6, $10 for 300 weeks.

Texas. L. 1913, c. 179, sec. 8, for 360 weeks.

CERTAIN WORDS DEFINED.

SECTION 10. As used in this section the term "child" includes step-children, adopted children, posthumous children, and acknowledged illegitimate children, but does not include married children unless dependent. The terms "brother" and "sister" include step-brothers and step-sisters, half-brothers and half-sisters, and brothers and sisters by adoption, but do not include married brothers nor married sisters unless dependent. The term "grandchild" includes children of adopted children and children of step-children, but does not include step-children of children, step-children of step-children, step-children of adopted children, nor married grandchildren unless dependent. The term "parent" includes step-parents and parents by adoption. The term "grandparent" includes parents of parents by adoption, but does not include parents of step-parents, step-parents of parents, nor step-parents of step-parents. The words "adopted" and "adoption" as used in this act shall

include cases where persons are treated as adopted as well as those of legal adoption.

SUNDRY PROVISIONS AS TO DEATH BENEFITS.

SECTION 11. In computing death benefits the average weekly wages of the deceased employee shall be considered not to be more than [ ] dollars, nor less than [ ] dollars; but the total weekly compensation shall not exceed in any case the average weekly wages computed as provided in section 15.

Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer unless and until such dependent or dependents prior in right shall have given him notice of his or their claim. In case the employer is in doubt as to the respective rights of rival claimants he may apply to the Industrial Accident Board to decide between them.

In case death occurs after a period of disability, either total or partial, the period of disability shall be deducted from the total periods of compensation respectively stated in section 9.

The compensation of a person who is insane shall be paid to his or her guardian.

MEDICAL ATTENDANCE.

SECTION 12. During the first [ ] days of disability the employer shall furnish reasonable surgical, medical, and hospital services and supplies not exceeding the amount of [ ] dollars. The pecuniary liability of the employer for the medical, surgical, and hospital service herein required shall

be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person.

Note. — "employer shall furnish reasonable surgical, medical, and hospital services."

This provision is usual.

Cf. California. L. 1913, c. 176, sec. 15, cl. (*a*), as reasonable within 90 days.

Connecticut. L. 1913, c. 138, sec. 7, as reasonable within 30 days.

Illinois. L. 1913 (c. 40, R.L.), sec. 8, cl. (*a*), not over 8 weeks, nor $200.

Iowa. L. 1913, c. 147, sec. 10, cl. (*b*), not over $100.

Kentucky. L. 1914, c. 73, sec. 35, not over $100, but none at all if employee is entitled by contract to such service elsewhere.

Louisiana. L. 1914, No. 20, sec. 8 (5), for 2 weeks, but not to exceed $100.

Massachusetts. L. 1911, c. 751, part II, sec. 5, reasonable for 2 weeks.

Michigan. L. 1912, No. 10, part II, sec. 4, reasonable for 3 weeks.

Minnesota. L. 1913, c. 467, sec. 18, not over $200.

Nebraska. L. 1913, c. 198, sec. 20, not over $200.

New Jersey. L. 1911, c. 95, sec. 14, not over $50.

New York. L. 1914, c. 41, sec. 13, such as may be requested by employee during 60 days.

Ohio. L. 1913, c. 000, sec. 42, not over $200.

Oregon. L. 1913, c. 112, sec. 23, not over $250.

Rhode Island. L. 1912, c. 831, art. II, sec. 5, reasonable for 2 weeks.

Texas. L. 1913, c. 179, sec. 7, reasonable for 1 week.

West Virginia. L. 1913, c. 10, sec. 27, not over $150.

Wisconsin. L. 1913, c. 599, sec. 2394–9, cl. 1, reasonable for not over 90 days.

TOTAL DISABILITY.

SECTION 13. Where the injury causes total disability for work the employer during such disability, but not including the first [ ] days thereof, shall pay the injured employee a weekly compensation equal to [ ] per cent of his average weekly wages, but not more than [ ] dollars, nor less than [ ] dollars, a week. In no case shall the weekly payments continue after the disability ends, nor longer than [ ] weeks.

In case of an employee whose average weekly wages are less than [ ] dollars a week the weekly compensation shall be the full amount of such average weekly wages, but where the disability is permanent the weekly compensation in such case shall be [five] dollars. In case the total disability begins after a period of partial disability, the period of partial disability shall be deducted from such total period of [ ] weeks.

In the case of the following injuries the disability caused thereby shall be deemed total and permanent; to wit:

(1) The total and permanent loss of sight in both eyes.

(2) The loss of both feet at or above the ankle.

(3) The loss of both hands at or above the wrist.

(4) The loss of one hand and one foot.

(5) An injury to the spine resulting in permanent and complete paralysis of both legs or both arms or of one leg or of one arm.

(6) An injury to the skull resulting in incurable imbecility or insanity.

The above enumeration is not to be taken as exclusive.

Note. — "during such disability." This provision is found in —

California. L. 1913, c. 176, sec. 15, cl. (*b*), but with smaller percentage after 240 weeks.
Kentucky. L. 1914, c. 73, sec. 41.
Nebraska. L. 1913, c. 198, sec. 21.
New York. L. 1914, c. 41, sec. 15.
Ohio. L. 1913, c. 000, sec. 34.
Oregon. L. 1913, c. 112, sec. 21, cl. (*b*).
Washington. L. 1911, c. 74, sec. 5, cl. (*b*).
West Virginia. L. 1913, c. 10, sec. 32.

"nor longer than [ ] weeks." A similar limitation is found in the following:

Iowa. L. 1913, c. 147, sec. 10, cl. (1), not over 400 weeks.
Kansas. L. 1913, c. 216, sec. 2, cl. (*b*), but not over 8 years.
Louisiana. L. 1914, No. 20, sec. 8 (1-*d*), not exceeding 400 weeks.
Maryland. L. 1914, c. 800, sec. 35, not over $5000.
Massachusetts. L. 1911, c. 751, sec. 9, not over $3000.
New Jersey. L. 1911, c. 95, sec. 11, cl. (*b*), not over 400 weeks.
Texas. L. 1913, c. 179, sec. 10, not over 400 weeks.
Wisconsin. L. 1913, c. 599, sec. 2394–9, cl. 2 (*d*), not over 15 years.

"but not including the first [ ] days thereof." A limit of 2 weeks is found in the following:

Arizona. L. 1912, c. 14, secs. 7, 8, cl. 1.
California. L. 1913, c. 176, sec. 15, cl. (*b*).
Connecticut. L. 1913, c. 138, sec. 8.
Iowa. L. 1913, c. 147, sec. 10, cl. (*g*).
Kansas. L. 1913, c. 216, sec. 11.
Massachusetts. L. 1911, c. 751, part II, sec. 4.
Michigan. L. 1912, No. 10, part II, sec. 3, in part.

Minnesota. L. 1913, c. 467, sec. 17.
New Hampshire. L. 1912, c. 163, sec. 6, cl. (2).
New Jersey. L. 1911, c. 95, sec. 13.
Rhode Island. L. 1912, art. II, sec. 4.

"[ ] per cent of his average weekly wages." A limit of 50 per cent is found in the following:

Arizona. L. 1912, c. 14, sec. 8, cl. 1.
Connecticut. L. 1913, c. 138, sec. 11.
Illinois. L. 1913 (c. 40, R.L.), sec. 8.
Iowa. L. 1913, c. 147, sec. 10, cl. (*h*).
Kansas. L. 1913, c. 216, sec. 11.
Louisiana. L. 1914, No. 20, sec. 8 (1-*d*).
Massachusetts. L. 1911, c. 751, part II, sec. 9.
Michigan. L. 1912, No. 10, part II, sec. 9.
Minnesota. L. 1913, c. 467, sec. 13, cl. (*d*).
Nebraska. L. 1913, c. 198, sec. 21.
Nevada. L. 1913, c. 111, sec. 25.
New Hampshire. L. 1911, c. 163, sec. 6, cl. (2).
New Jersey. L. 1911, c. 95, sec. 10, cl. (*b*).
Rhode Island. L. 1912, c. 831, part II, sec. 6.

"nor less than [five] dollars a week." The following have this:

Connecticut. L. 1913, c. 138, sec. 11.
Illinois. L. 1913 (c. 40, R.L.), sec. 8, cl. (*f*).
Iowa. L. 1913, c. 147, sec. 10, cl. (1).
Kansas. L. 1913, c. 216, sec. 11, not less than $6.
Louisiana. L. 1914, No. 20, sec. 8 (1-*d*), not less than $3.
Minnesota. L. 1913, c. 467, sec. 13, not less than $6.
Nebraska. L. 1913, c. 198, sec. 21.
New Jersey. L. 1911, c. 95, sec. 11, cl. (*b*).
Ohio. L. 1913, c. 000, sec. 34.
Texas. L. 1913, c. 179, sec. 10.

"In the case of the following injuries the disability caused thereby shall be deemed total and permanent."

This provision is intended to assist in the administration of the act.

Similar provisions are found in the following:

California. L. 1913, c. 176, sec. 15, cl. (9).
Iowa. L. 1913, c. 147, sec. 10, cl. (17).
Maryland. L. 1914, c. 800, sec. 35.
Michigan. L. 1912, No. 10, part II, sec. 10.
New Jersey. L. 1911, c. 95, sec. 11, cl. (*c*).
Ohio. L. 1913, c. 000, sec. 34.
Rhode Island. L. 1912, c. 831, part II, sec. 10.

PARTIAL DISABILITY.

SECTION 14. Where the injury causes partial disability for work, the employer, during such disability and for a period of [ ] years beginning on the [ ] day of disability, shall pay the injured workman a weekly compensation equal to [ ] per cent of the difference between his average weekly wages before the accident and the weekly wages he is most probably able to earn thereafter, but not more than [ ] dollars a week. In no case shall the weekly payments continue after the disability ends, and in case the partial disability begins after a period of total disability the period of total disability shall be deducted from such total period of [ ] years.

In the case of the following injuries the compensation shall be [ ] per cent of the average weekly wages, but not more than [ ] dollars to be paid weekly for the periods stated against such injuries respectively; to wit:

(1) The loss by separation of one arm at or above the elbow joint, or the permanent and complete loss of the use of one arm, [ ] weeks.

(2) The permanent and complete loss of hearing in both ears, [ ] weeks.

(3) The loss by separation of one leg at or above the knee joint, or the permanent and complete loss of the use of one leg, [ ] weeks.

(4) The loss by separation of one hand at or above the wrist joint, or the permanent and complete loss of the use of one hand, [ ] weeks.

(5) The loss by separation of one foot at or above the ankle joint, or the permanent and complete loss of the use of one foot, [ ] weeks.

Note. — "for a period of [ ] years." In the following states the period is as stated below:

California. L. 1913, c. 176, sec. 15, cl. (4), not over 240 weeks.

Connecticut. L. 1913, c. 138, sec. 11, not over 520 weeks.

Iowa. L. 1913, c. 147, sec. 10, cl. (*h*), not over 300 weeks.

Illinois. L. 1913 (c. 40, R.L.), sec. 8, cl. (*h*), not over 8 years.

Kansas. L. 1913, c. 216, sec. 11, not over 8 years.

Kentucky. L. 1914, c. 73, sec. 40, not over $3750.

Louisiana. L. 1914, No. 20, sec. 8 (1), not over 300 weeks.

Maryland. L. 1914, c. 800, sec. 35, not over 6 years, nor more than $3750.

Massachusetts. L. 1911, c. 751, part II, sec. 10, not over 300 weeks.

Michigan. L. 1912, No. 10, part II, sec. 10, not over 300 weeks.

Minnesota. L. 1913, c. 467, sec. 13 (*c*), not over 300 weeks.

Nebraska. L. 1913, c. 198, sec. 21, not over 300 weeks.

Nevada. L. 1913, c. 111, sec. 25, not over 60 months.

New Hampshire. L. 1911, c. 163, sec. 6, cl. (2), not over 300 weeks.
New Jersey. L. 1911, c. 95, sec. 11, cl. (*a*), not over 300 weeks.
New York. L. 1914, c. 41, sec. 15, not over $3500, unless permanent.
Ohio. L. 1913, c. 000, sec. 33, not over $3750.
Oregon. L. 1913, c. 112, sec. 21, cl. (*f*), not over 96 months.
Rhode Island. L. 1912, c. 831, part II, sec. 11, not over 300 weeks.
Texas. L. 1913, c. 179, sec. 11, not over 300 weeks.
Wisconsin. L. 1913, c. 599, sec. 2394–9, cl. 2, not over four times average annual earnings.

"In the case of the following injuries the compensation shall be . . . for the periods stated . . ."

This provision is intended to assist in the administering of the act. A similar provision is found in the following:

Connecticut. L. 1913, c. 138, sec. 12.
Illinois. L. 1913 (c. 40, R.L.), sec. 8, cl. (*e*).
Iowa. L. 1913, c. 147, sec. 10, cl. (*j*).
Massachusetts. L. 1911, c. 751, part II, sec. 11.
Michigan. L. 1912, No. 10, part II, sec. 10.
Minnesota. L. 1913, c. 467, sec. 13, cl. (*c*).
Nebraska. L. 1913, c. 198, sec. 21.
Nevada. L. 1913, c. 111, sec. 25.
New Jersey. L. 1911, c. 95, sec. 10, cl. (*c*).
Ohio. L. 1913, c. 000, sec. 33.
Oregon. L. 1913, c. 112, sec. 21, cl. (*f*).
Rhode Island. L. 1912, c. 831, part II, sec. 12.
Wisconsin. L. 1913, c. 599, sec. 2394–9, cl. (5).

COMPUTATION OF WAGES.

SECTION 15. Average weekly wages shall be computed in such a manner as is best calculated to give

the average weekly earnings of the workman during the twelve months preceding his injury; *provided that* where, by reason of the shortness of the time during which the workman has been in the employment, or the casual nature of the employment, or the terms of the employment, it is impracticable to compute the rate of remuneration, regard may be had to the average weekly earnings which, during the twelve months previous to the injury, were being earned by a person in the same grade employed at the same work by the employer of the injured workman, or if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

If a workman at the time of the injury is regularly employed in a higher grade of work than formerly during the year and with larger regular wages, only such larger wages shall be taken into consideration in computing his average weekly wages.

Note. — There may be a very great difference between average weekly wages and average weekly earnings. In the case of what is called a seasonal occupation, like that of a house painter or a longshoreman, if we take his daily wages at the date of the injury and multiply by 305, as the number of working days in a year, and divide by 52, we get a result which is quite erroneous. The New York act seems to be faulty in this respect.

VOLUNTARY PAYMENTS.

SECTION 16. Any payments made by the employer or his insurer to the injured workman during the period of his disability, or to his dependents, which, by the terms of this act, were not due and payable

when made, may, subject to the approval of the Board, be deducted from the amount to be paid as compensation; *provided that* in case of disability such deduction shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payments under sections 13 and 14.

PERIODICAL PAYMENTS.

SECTION 17. The Board, upon the application of either party, may in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly.

COMMUTATION OF PAYMENTS.

SECTION 18. Whenever the Board determines that it is for the best interest of all parties, the liability of the employer for compensation may, on application to the Board by any party interested, be discharged in whole or in part by the payment of one or more lump sums to be fixed by the Board.

Note. — " payment of a lump sum to be fixed by the Board." Similar provisions are found in —

California. L. 1913, c. 176, sec. 33, cl. (*a*).
Connecticut. L. 1913, c. 138, sec. 28.
Illinois. L. 1913 (c. 40, R.L.), sec. 9.
Iowa. L. 1913, c. 147, sec. 15.
Massachusetts. L. 1911, c. 751, part II, sec. 22.
Michigan. L. 1912, No. 10, part II, sec. 22.
Minnesota. L. 1913, c. 467, sec. 25.
Nebraska. L. 1913, c. 198, sec. 40.
Nevada. L. 1913, c. 111, sec. 31.

New Jersey. L. 1911, c. 95, sec. 21.
Ohio. L. 1913, c. 000, sec. 40.
Rhode Island. L. 1912, c. 831, part II, sec. 25.
Texas. L. 1913, c. 179, sec. 15.
Washington. L. 1911, c. 74, sec. 7.
West Virginia. L. 1913, c. 10, sec. 41.
Wisconsin. L. 1913, c. 599, sec. 2394–9, cl. (5).

"one or more lump sums."
See New York. L. 1914, c. 41, sec. 25.

Foreign experience shows that in the case of temporary disability where there is any nervous affection commutation is often desirable. If a lump sum is paid, the workman very likely will get well promptly and go back to work; whereas if he is under a pension arrangement this is not so likely to happen.

TRUSTEE IN CASE OF LUMP SUM PAYMENTS.

SECTION 19. Whenever for any reason the Board deems it expedient, any lump sum which is to be paid as provided in section 18 shall be paid by the employer to some suitable person or corporation appointed by the [ ] court as trustee to administer or apply the same for the benefit of the person or persons entitled thereto in the manner provided by the Board. The receipt of such trustee for the amount so paid shall discharge the employer or any one else who is liable therefor.

Note. — "Trustee in case of lump-sum payments." Something like this is contained in the following:

California. L. 1913, c. 176, sec. 33, cl. (*c*).
Connecticut. L. 1913, c. 138, sec. 28.
Illinois. L. 1913 (c. 40, R.L.), sec. 25.
Minnesota. L. 1913, c. 467, sec. 28.
Nebraska. L. 1913, c. 198, sec. 43.
Wisconsin. L. 1913, c. 599, sec. 2394–28.

III.

PROCEDURE IN OBTAINING COMPENSATION.

MEDICAL EXAMINATION.

SECTION 20. After an injury and during the period of disability, the workman, if so requested by his employer, or ordered by the Board, shall submit himself to examination, at reasonable times and places, to a duly qualified physician or surgeon designated and paid by the employer. The workman shall have the right to have a physician or surgeon designated and paid by himself present at such examination, which right, however, shall not be construed to deny to the employer's physician the right to visit the injured workman at all reasonable times and under all reasonable conditions during total disability. If a workman refuses to submit himself to or in any way obstructs such examination, his right to take or prosecute any proceeding under this act shall be suspended until such refusal or obstruction ceases, and no compensation shall be payable for the period during which such refusal or obstruction continues.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

SECTION 21. No proceedings under this act for compensation for an injury shall be maintained unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within [ ] after the date of the injury; or, in the case of death, then within [ ] after

such death, whether or not a claim had been made by the employee himself for compensation. Such notice and such claim may be given or made by any person claiming to be entitled to compensation or by some one on his behalf. If payments of compensation have been made voluntarily the making of a claim within said period shall not be required.

Note. — Notice "as soon as practicable." Found in —

Massachusetts. L. 1911, c. 751, part II, sec. 15.
Nebraska. L. 1913, c. 198, sec. 33.
Texas. L. 1913, c. 179, part II, sec. 4*a*.

Claim "within [ ] after the date of the injury."

Connecticut. L. 1913, c. 138, part B, sec. 21, within 1 year.
Kentucky. L. 1914, c. 73, sec. 75, within 1 year.
Louisiana. L. 1914, No. 20, sec. 11 (1), within 6 months.

Claim "within [ ] after such death."

New York. L. 1914, c. 41, sec. 28, within 1 year.
Texas. L. 1913, c. 179, part II, sec. 4*a*, within 6 months.
West Virginia. L. 1913, c. 10, sec. 39, within 6 months.

FORM OF NOTICE AND CLAIM.

SECTION 22. Such notice and such claim shall be in writing, and such notice shall contain the name and address of the employee, and shall state in ordinary language the time, place, nature, and cause of the injury, and shall be signed by him or by a person on his behalf, or, in the event of his death, by any one or more of his dependents or by a person on their behalf. The notice may include the claim.

GIVING OF NOTICE AND MAKING OF CLAIM.

SECTION 23. Any notice under this act shall be given to the employer, or, if the employer be a partnership, then to any one of the partners. If the employer be a corporation, then the notice may be given to any agent of the corporation upon whom process may be served, or to any officer of the corporation, or any agent in charge of the business at the place where the injury occurred. Such notice shall be given by delivering it or by sending it by mail by registered letter addressed to the employer at his or its last known residence or place of business. The foregoing provisions shall apply to the making of a claim.

SUFFICIENCY OF NOTICE.

SECTION 24. A notice given under the provisions of section 21 of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature, or cause of the injury, or otherwise, unless it is shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this act if it be shown that the employer, his agent or representative, had knowledge of the accident, or that the employer has not been prejudiced by such delay or want of notice.

Note. — As to the provision that failure to give notice shall not be a bar if employer is not prejudiced. See, to the same effect, —

California. L. 1913, c. 176, sec. 20.
Connecticut. L. 1913, c. 138, sec. 21.
Illinois. L. 1913 (c. 40, R.L.), sec. 24.

Iowa. L. 1913, c. 147, sec. 9.
Kansas. L. 1913, c. 216, sec. 22.
Louisiana. L. 1914, No. 20, sec. 15.
Massachusetts. L. 1912, c. 571, sec. 5.
Minnesota. L. 1913, c. 467, sec. 19.
New Hampshire. L. 1911, c. 163, sec. 5.
Rhode Island. L. 1912, c. 831, part II, sec. 20, is similar.

LIMITATION OF TIME AS REGARDS MINORS AND INSANE.

SECTION 25. No limitation of time provided in this act shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian, or next friend.

IV.

INDUSTRIAL ACCIDENT BOARD.

Note. — Sections 26–41, inclusive, which relate to procedure, are intended to be suggestive only, and may be modified in those states which require a jury trial, and may be supplemented by further provisions needed to meet any local needs.

CREATION OF BOARD.

SECTION 26. A Board is hereby created, to be known as the Industrial Accident Board, consisting of five members to be appointed by the Governor, by and with the consent of the [ ], one of whom shall be designated by the Governor as chairman. Appointments to fill vacancies may be made during the recesses of the [ ], but shall be subject to confirmation by the [ ] at the next ensuing session of the [ ]. Each member of the Board shall hold office for five years except that when the Board is first constituted one member shall be ap-

pointed for one year, one for two years, one for three years, one for four years, and one for five years. Thereafter one member shall be appointed every year for the full term of five years.

Note. — Industrial Accident Board. Tribunals of this kind have been created in the following states to administer workmen's compensation laws:

California. L. 1913, c. 176, sec. 3. "Industrial Accident Commission."

Connecticut. L. 1913, c. 138, sec. 16. "Compensation Commissioners."

Illinois. L. 1913 (c. 40, R.L.), sec. 13. "Industrial Board."

Iowa. L. 1913, c. 147, sec. 23. "Industrial Commissioner."

Kentucky. L. 1914, c. 73, sec. 1. "The Workmen's Compensation Board."

Maryland. L. 1914, c. 800, sec. 1. "State Industrial Accident Commission."

Massachusetts. L. 1911, c. 751, part III. "Industrial Accident Board."

Michigan. L. 1912, No. 10, part III. "Industrial Accident Board."

Nevada. L. 1913, c. 111, sec. 8. "Nevada Industrial Commission."

New York. L. 1914, c. 41, sec. 60. "State Workmen's Compensation Commission."

Ohio. L. 1913, c. 000, sec. 1. "State Liability Board of Awards."

Oregon. L. 1913, c. 112, sec. 2. "State Industrial Accident Commission."

Texas. L. 1913, c. 179, part II. "Industrial Accident Board."

Wisconsin. L. 1911, c. 110*a*, sec. 2394–42. "Industrial Commission of Wisconsin."

SALARIES AND EXPENSES.

SECTION 27. The salaries and expenses of the Board shall be paid by the state. The salary of the chairman shall be [ ] dollars per year, and the salary of the other members shall be [ ] dollars per year each. The Board may appoint a secretary at a salary of not more than [ ] dollars per year, and may remove him. The Board shall be provided with offices in the capitol, or in some other suitable building in the city of [ ], in which its records shall be kept, and it shall also be provided with necessary office furniture, stationery, and other supplies. The Board shall have a seal for the authentication of its orders, awards, and proceedings, upon which shall be inscribed the words, "Industrial Accident Board — [ ] — Seal." It shall employ such assistants and clerical help as it may deem necessary, and fix the compensation of all persons so employed: Provided that all such clerical assistants shall be subject to existing laws regulating the selection, grading, and compensation of department clerks. The members of the Board and its assistants shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the Board, but such expenses shall be sworn to by the person who incurred the same, and shall be approved by the chairman of the Board before payment is made. All such salaries and expenses shall be audited and paid out of the state treasury in the manner prescribed for similar expenditures in other departments or branches of the state service.

RULES OF BOARD, WITNESSES, BLANKS.

SECTION 28. The Board may make rules not inconsistent with this act for carrying out the provisions of this act. Process and procedure under this act shall be as summary and simple as reasonably may be. The Board, or any member thereof, shall have the power to subpœna witnesses, administer oaths, and to examine such of the books and records of the parties to a proceeding as relate to the questions in dispute. The [ ] court shall have power to enforce by proper proceedings the attendance and testimony of witnesses, and the production and examination of books, papers, and records. The Board shall cause to be printed and furnished free of charge to any employer or employee such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this act.

Note. — "Process and procedure under this act shall be as summary and simple as reasonably may be." Similar provisions are found in the following:

Connecticut. L. 1913, c. 138, part B, sec. 25:

"He shall not be bound by the ordinary common law or statutory rules of evidence or procedure."

Illinois. L. 1913 (c. 40, R.L.), sec. 16:

"as simple and summary as reasonably may be."

Iowa. L. 1913, c. 147, sec. 25:

"as summary as reasonably may be."

Massachusetts. L. 1911, c. 751, part III, sec. 3:

"as summary as reasonably may be."

Michigan. L. 1912, No. 10, part III, sec. 3:

"as summary as reasonably may be."

New Jersey. L. 1911, c. 95, sec. 20:

"in a summary manner."

Ohio. L. 1913, c. 000, sec. 44:

"shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure other than as herein provided."

Rhode Island. L. 1912, c. 831, part III, sec. 6:

"in a summary manner."

Texas. L. 1913, c. 179, part II, sec. 4:

"process and procedure shall be as summary as may be."

West Virginia. L. 1913, c. 10, sec. 44:

"shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure other than as herein provided."

AGREEMENTS.

SECTION 29. If the employer and the injured employee reach an agreement in regard to compensation under this act, a memorandum of the agreement shall be filed with the Board and, if approved by it, thereupon the memorandum shall for all purposes be enforceable under the provisions of section 38, unless modified as provided in section 36.

Such agreements shall be approved by the Board only when the terms conform to the provisions of this act.

COMMITTEE OF ARBITRATION.

SECTION 30. If the compensation is not settled by agreement, either party may make an application to the Board for the formation of a committee of arbitration. Such committee shall consist of three members, one of whom shall be a member of the Indus-

trial Accident Board, or appointed by it, who shall act as chairman. The other two members shall be named, respectively, by the parties. If a vacancy occurs it shall be filled in the same way as the original appointment.

Note. — "or appointed by it." These words are used so that hearings may not be delayed when work of Board is congested.

Cf. Maryland. L. 1914, c. 800, sec. 39.

New York. L. 1914, c. 41, sec. 20, for similar provision.

FORMATION OF COMMITTEE.

SECTION 31. Immediately after such application the Board shall designate one of its members, or a substitute, to act as chairman of the committee of arbitration, and shall request the parties to appoint their respective representatives. If within seven days after such request, or after a vacancy has occurred, either party does not appoint his representative the Board shall fill the vacancy and notify the parties to that effect.

Note. — "or a substitute." These words are used so that hearings may not be delayed when the work of the Board is congested.

HEARINGS AND AWARDS.

SECTION 32. The committee on arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee, unless otherwise agreed, shall be held in the city or town where the injury occurred if within this state, and the award of the committee, together with a statement of its findings of fact, rulings of law, and any other matters pertinent to the questions arising before it, shall be filed with the Industrial Accident

Board. A copy of the award shall be immediately sent to the parties. Unless a claim for a review is filed by either party within [ ] days the award shall be enforceable under the provisions of section 38.

EXAMINATION BY PHYSICIAN.

SECTION 33. The Industrial Accident Board, or any member thereof, may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be [ ] dollars and traveling expenses, but the Board may allow additional reasonable amounts in extraordinary cases.

EXPENSES OF ARBITRATORS AND PHYSICIANS.

SECTION 34. The fees and expenses of arbitrators under section 32 and of physicians under section 33 shall be paid by the state, as the other expenses of the Board are paid.

REVIEW OF AWARD.

SECTION 35. If an application for review is made to the Board, or if the committee fails to make an award within thirty days after its formation, the Board shall allow a full trial and shall make an award which shall be filed with the record of proceedings and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award.

MODIFICATION OF AWARDS AND AGREEMENTS.

SECTION 36. On the application of any party on the ground of a change in conditions, the Board may

at any time, but not oftener than once in six months, review any agreement or award, and on such review may make an award ending, diminishing, or increasing the compensation previously agreed upon or awarded subject to the maximum and minimum provided in this act, and shall state its conclusions of fact and rulings of law, and immediately send to the parties a copy of the award, but this section shall not apply to a commutation of payments under section 18.

APPEALS FROM BOARD.

SECTION 37. An award of the Board, in the absence of fraud, shall be final and conclusive between the parties except as provided in section 36, unless within [ ] days after a copy has been sent to the parties either party appeals to the [ ] court. On such appeal the jurisdiction of said court shall be limited to a review of questions of law. The Board may certify questions of law to the highest court for its determination.

Note. — Your committee thinks that two trials on questions of fact are sufficient. In states where the constitution requires a right of jury trial the following language may be used:

"In case of every such appeal the right of a trial by jury shall be deemed to be waived unless claimed within [ ] days from the date such appeal is entered. Said court may by proper rules prescribe the procedure to be followed in the case of such appeals."

The right to a jury trial is not recognized in the following states:

California. L. 1913, c. 176, secs. 24–27, 82–86, jury not allowed.

Illinois. L. 1913, c. 40, sec. 19, jury not allowed.

Iowa. L. 1913, c. 147, secs. 33, 34, jury not allowed.

Louisiana. L. 1914, No. 20, secs. 18, 19, jury not allowed.

Massachusetts. L. 1912, c. 571, secs. 10–13, jury not allowed.

Michigan. L. 1912, No. 10, part III, sec. 12, jury not allowed.

Minnesota. L. 1913, c. 467, secs, 22, 30, jury not allowed.

Nebraska. L. 1913, c. 198, secs. 37, 39, jury not allowed.

Nevada. L. 1913, c. 111, sec. 34, jury not allowed.

New Jersey. L. 1911, c. 95, sec. 20, jury not allowed.

New York. L. 1914, c. 41, sec. 23, jury not allowed.

Oregon. L. 1913, c. 112, sec. 32, jury allowed by the court in its discretion.

Rhode Island. L. 1912, c. 831, part III, secs. 6, 7, jury not allowed.

West Virginia. L. 1913, c. 10, sec. 43, jury not allowed.

Wisconsin. L. 1913, c. 599, sec. 2394–19, jury not allowed.

The right of jury trial is recognized in the following states:

Arizona. L. 1912, c. 14, sec. 75, jury allowed if claimed.

Connecticut. L. 1913, c. 138, sec. 27, jury not mentioned, but allowed by implication.

Kansas. L. 1913, c. 216, sec. 36, jury allowed if claimed.

Kentucky. L. 1914, c. 73, secs. 52, 72, jury allowed by implication, but on certain questions only.

Maryland. L. 1914, c. 800, sec. 55, jury allowed if claimed.

Ohio. L. 1913, c. 000, sec. 1465–90, jury allowed on certain questions if demanded.

Texas. L. 1913, c. 179, part II, sec. 5, jury not mentioned, but allowed by implication.

Washington. L. 1911, c. 74, sec. 20, jury allowed on certain questions only.

ENFORCEMENT OF AWARD.

SECTION 38. Any party in interest may file in the [ ] court for the county in which the injury occurred, or for the county of [ ], a certified copy of a decision of the Board awarding compensation from which no appeal has been taken within the time allowed therefor, or a certified copy of a decision of an arbitration committee awarding compensation from which no claim for review has been filed within the time allowed therefor, or a certified copy of a memorandum of agreement approved by the Board, whereupon said court shall render a decree or judgment in accordance therewith and notify the parties thereof. Such decree or judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said decree or judgment had been rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom.

Note. — As payment of compensation is made certain by the provisions as to insurance nothing further in the way of security is needed.

COSTS.

SECTION 39. If the committee of arbitration, Industrial Accident Board, or any court before whom any proceedings are brought under this act, determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who has so brought, prosecuted, or defended them.

GENERAL POWERS OF BOARD.

SECTION 40. All questions arising under this act, if not settled by agreement of the parties interested therein with the approval of the Board, shall, except as otherwise herein provided, be determined by the Board. The decisions of the Board shall be enforceable by the [ ] court under the provisions of section 38. There shall be a right of appeal from decisions of the Board to the [ ] court as provided in section 37, but in no case shall such an appeal, either under this section or under section 37, operate as a supersedeas or stay unless the Board or the [ ] court shall so order.

REVISION OF DECREES.

SECTION 41. The [ ] court, upon the filing with it of a certified copy of a decision of the Industrial Accident Board ending, diminishing, or increasing compensation previously awarded, shall revoke or modify its prior decree or judgment so that it will conform to said decision.

INJURIES OUTSIDE THE STATE.

SECTION 42. If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though such injury was received outside of this state.

If a workman who has been hired outside of this state is injured while engaged in his employer's business, and is entitled to compensation for such injury

under the law of the state where he was hired, he shall be entitled to enforce against his employer his rights in this state if his rights are such that they can reasonably be determined and dealt with by the Board and the court in this state.

Note. — Justice demands that employees shall be protected if their employer leaves the state to escape paying compensation. The same is true of employees who are sent out of the state on business of the employer.

The law of the place of hiring (*lex loci contractus*) may well govern in this as in many other matters.

Rights under the laws of other states should be enforced if possible, as a matter of comity, if not as a matter of right.

V.

PREFERENCES AND ASSIGNMENTS.

PREFERENCES.

SECTION 43. All rights of compensation granted by this act shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor.

ASSIGNMENTS; ATTORNEYS' FEES.

SECTION 44. No claims for compensation under this act shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors. Claims of attorneys and of physicians for services under this act shall be subject to the approval of the Board.

VI.

SECURITY FOR COMPENSATION.

SECURITY FOR PAYMENT OF COMPENSATION.

SECTION 45. Employers, but not including the state or the municipal bodies mentioned in section 2, shall secure compensation to their employees in one of the following ways:

(1) By insuring and keeping insured the payment of such compensation in the state insurance fund, or

(2) By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state, or

(3) By obtaining and keeping in force guarantee insurance with any company authorized to do such guarantee business within the state, or

(4) By depositing and maintaining with the state insurance manager security satisfactory to said manager securing the payment by said employer of compensation according to the terms of this act.

Note. — "Security for Compensation." To protect employers and employees it is desirable, if not necessary, that employers should be insured and that all such insurance should be made payable to the employees.

In the following states the employer, as a rule, must signify his election to come under the Act by taking out insurance payable to his workmen; or, if he elects to come under the Act, is required to insure or pay into an insurance fund:

Connecticut. L. 1913, c. 138, sec. 30.
Illinois. L. 1913 (c. 40, R.L.), sec. 26.
Iowa. L. 1913, c. 147, sec. 42.
Kentucky. L. 1914, c. 73, secs. 70–74.
Massachusetts. L. 1911, c. 751, part IV, part V, sec. 3.

Michigan. L. 1912, No. 10, part I, sec. 6, part IV, sec. 1.
Nevada. L. 1913, c. 111, sec. 21.
Oregon. L. 1913, c. 112, sec. 19.
Texas. L. 1913, c. 179, part III, sec. 19.
West Virginia. L. 1913, c. 10, secs. 9, 26.
Wisconsin. L. 1913, c. 599, secs. 2394–24, 2394–26.

In the following states having compulsory acts insurance is required:

California. L. 1913, c. 176, sec. 36.
Maryland. L. 1914, c. 800, sec. 15.
New York. L. 1914, c. 41, sec. 50.
Ohio. L. 1913, c. 000, sec. 1465–62.
Washington. L. 1911, c. 74, sec. 4.

If in any state the laws relating to insurance do not provide for the organization of mutual insurance associations by employers such provision should be made by further legislation.

NOTICE OF INSURANCE.

SECTION 46. If the insurance so effected is not with the state insurance fund the employer shall forthwith file with the state insurance manager in form prescribed by him a notice of his insurance, together with a copy of the contract or policy of insurance.

POSTING OF NOTICE REGARDING INSURANCE.

SECTION 47. Every employer who has complied with section 45 of this act shall post and maintain in a conspicuous place or places in and about his place or places of business typewritten or printed notices in form prescribed by the state insurance manager, stating the fact that he has complied with the law as to securing the payment of compensation

to his employees and their dependents in accordance with the provisions of this act.

EFFECT OF FAILURE TO SECURE COMPENSATION.

SECTION 48. If an employer fails to comply with the provisions of section 45 he shall be liable to a penalty for every day during which such failure continues of one dollar for every employee to be recovered in an action brought by the state insurance manager in the name of the state or in his own name, and the amounts so collected shall be paid into the state insurance fund.

The state insurance manager may, however, in his discretion, for good cause shown, remit any such penalty in whole or in part, provided the employer in default secures compensation, as provided in section 45.

Furthermore, if any employer shall be in default under section 45, for a period of thirty days, he may be enjoined by the [ ] court from carrying on his business while such default continues.

Note. — Effect of failure to secure compensation. In different states various penalties are provided.

Cf. Maryland. L. 1914, c. 800, sec. 22.
Michigan. L. 1912, No. 10, part V, sec. 5.
New York. L. 1914, c. 41, sec. 99.
Ohio. L. 1913, c. 000, sec. 1465–75.
Washington. L. 1911, c. 74, sec. 8.

THE INSURANCE CONTRACT.

SECTION 49. Every policy of insurance and every guarantee contract covering the liability of the employer for compensation, whether issued by the state

insurance manager, or by a stock company, or by a mutual association authorized to transact workmen's compensation or guarantee insurance in this state shall cover the entire liability of the employer to his employees covered by the policy or contract, and also shall contain a provision setting forth the right of the employees to enforce in their own names either by at any time filing a separate claim or by at any time making the insurance carrier a party to the original claim, the liability of the insurance carrier in whole or in part for the payment of such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance carrier shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid.

KNOWLEDGE OF EMPLOYER TO AFFECT INSURANCE CARRIER.

SECTION 50. Every such policy and contract shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this act, be jurisdiction of the insurance carrier, and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions, or awards rendered against the employer for the payment of compensation under the provisions of this act.

INSOLVENCY OF EMPLOYER NOT TO RELEASE INSURANCE CARRIER.

SECTION 51. Every such policy and contract shall contain a provision to the effect that the insolvency or bankruptcy of the employer and his discharge therein shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy or contract.

CANCELATION OF INSURANCE CONTRACTS.

SECTION 52. No policy or contract of insurance or guaranty issued by a stock company or mutual association against liability arising under this act shall be canceled within the time limited in such contract for its expiration until at least ten days after notice of intention to cancel such contract, on a date specified in such notice, shall have been filed in the office of the state insurance manager and also served on the employer.

INSURANCE BY THE STATE, COUNTIES, AND MUNICIPALITIES.

SECTION 53. The state, and each county, city, town, or other public corporation, which is liable to its employees for compensation may insure either with the state insurance fund or with any other authorized insurance carrier.

Note. — Insurance by state, counties, and municipalities. This is allowed in —

California. L. 1913, c. 176, sec. 46.

EMPLOYEES NOT TO PAY FOR INSURANCE.

SECTION 54. No agreement by an employee to pay any portion of the premiums paid by his employer to the state insurance fund or to contribute to a benefit fund or department maintained by such employer or to the cost of mutual or other insurance maintained for or carried for the purpose of securing compensation as herein required shall be valid; and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this act shall be guilty of a misdemeanor.

VII.

STATE INSURANCE FUND.

CREATION OF STATE FUND.

SECTION 55. There is hereby created a fund, to be known as "The State Insurance Fund," for the purpose of insuring employers against liability for compensation under this act and of assuring to the persons entitled thereto the compensation provided by this act. Such fund shall consist of all premiums and penalties received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided.

Such fund shall be administered by the state insurance manager without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of com-

pensation and of expenses in the manner provided in this act.

Note. —There is state-administered insurance in the following states:

California. L. 1913, c. 176, sec. 36.
Kentucky. L. 1914, c. 73, sec. 20.
Maryland. L. 1914, c. 800, sec. 17.
Michigan. L. 1912, No. 10, part V.
Nevada. L. 1913, c. 111, sec. 21.
New York. L. 1914, c. 41, art. 5.
Ohio. L. 1913, c. 000, sec. 1465–72.
Oregon. L. 1913, c. 112, sec. 20.
Washington. L. 1911, c. 74, sec. 4.
West Virginia. L. 1913, c. 10, secs. 1, 19.

"Without liability on the part of the state."

This is the usual provision. See —

California. L. 1913, c. 176, sec. 36.
Maryland. L. 1914, c. 800, sec. 16.
New York. L. 1914, c. 41, sec. 90.

STATE INSURANCE MANAGER.

SECTION 56. The Governor, with the approval of the [ ], shall appoint a manager of the state insurance fund, who shall hold office for the term of five years unless sooner removed by the Governor for cause stated. Any vacancy in said office may be filled at any time by appointment made by the Governor with the approval of the [ ]. If such an appointment is made during a recess of the [ ] it shall be subject to confirmation by the [ ] at its next ensuing session.

Note. — "State Insurance Manager." The following states have such an official:

California. L. 1913, c. 176, secs. 7, 38, "manager of the state compensation insurance fund."

Maryland. L. 1914, c. 800, secs. 1–13, "State Industrial Accident Commission."

Michigan. L. 1912, No. 10, part V, "commissioner of insurance."

Ohio. L. 1913, c. 000, sec. 1465–41*a*, "state liability board of awards."

Washington. L. 1911, c. 74, sec. 21, "Industrial Insurance Department."

West Virginia. L. 1913, c. 10, sec. 1, "public service commission."

It is important that the state insurance fund should not be administered by the Industrial Accident Board, or by any one appointed by it. That board is largely a judicial body, and must hear and decide claims against the fund, and cannot properly act as a party defendant and also as the court which is to decide the case.

POWERS AND DUTIES OF STATE INSURANCE MANAGER.

SECTION 57. It shall be the duty of such state insurance manager to conduct the business of the state insurance fund, and he is hereby vested with full authority over the said fund, and may do any and all things which are necessary or convenient in the administration thereof, or in connection with the insurance business to be carried on by him under the provisions of this act.

FURTHER STATEMENT OF POWERS.

SECTION 58. The state insurance manager shall have full power to determine the rates to be charged for insurance in said fund, and to conduct all business in relation thereto, all of which business shall

be conducted in his official name of state insurance manager.

POWER TO SUE AND BE SUED.

SECTION 59. The state insurance manager may in his official name sue and be sued in all the courts of the state, including the Industrial Accident Board, in all actions or proceedings arising out of anything done or suffered in connection with the state insurance fund or business relating thereto.

Note. — "Power to Sue and be Sued."
Cf. California. L. 1913, c. 176, sec. 38.

CONTRACTS.

SECTION 60. The state insurance manager may in his official name make contracts of insurance as herein provided and such other contracts relating to the state insurance fund as are authorized or permitted under the provisions of this act.

Note. — "Contracts of Insurance." Such contracts are provided for in —

California. L. 1913, c. 176, secs. 41, 42.
New York. L. 1914, c. 41, sec. 100.

EMPLOYMENT OF ASSISTANTS.

SECTION 61. The state insurance manager may employ such assistants, experts, statisticians, actuaries, accountants, inspectors, clerks, and other employees as he may deem necessary to carry out the provisions of this act or to perform the duties imposed upon him by this act; provided that all such

clerical assistants shall be subject to existing laws regulating the selection, grading, and compensation of department clerks.

PERSONAL LIABILITY.

SECTION 62. The state insurance manager shall not, nor shall any person employed by him, be personally liable in his private capacity for or on account of any act performed or contract entered into in an official capacity in good faith and without intent to defraud, in connection with the administration of the state insurance fund or affairs relating thereto.

SALARIES, EXPENSES; AND PAYMENT OF SAME.

SECTION 63. The salary of the state insurance manager shall be [ ] dollars per year. His salary, and the salaries or compensation of his several employees, and all expenses incurred by him shall be audited and paid in the first instance out of the state treasury in the manner prescribed for similar expenditures in other departments or branches of the state service.

DELEGATION OF POWERS.

SECTION 64. The state insurance manager may act through proper deputies and may delegate to such deputies such powers as he deems necessary or convenient.

Among the powers which may be so delegated shall be the power to enter into contracts of insurance, insuring employers against liability for compensation as herein provided and insuring to employees the compensation fixed by this act; also

the power to make agreements, subject to the approval of the Industrial Accident Board, for the settlement of claims against said fund for compensation for injuries in accordance with the provisions of this act; also the power to determine to whom and through whom payments of such compensation shall be made; and also the power to contract with physicians, surgeons, and hospitals for medical and surgical treatment and care and nursing of injured persons entitled to compensation from said fund.

BOND.

SECTION 65. Before entering on the duties of his office the state insurance manager shall give an official bond in the sum of [ ] dollars and shall take and subscribe an official oath. Said bond shall be approved and filed as in the case of other official bonds required of state officials.

STATE TREASURER CUSTODIAN OF FUND.

SECTION 66. The state treasurer shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon warrants or vouchers authorized and signed by the state insurance manager, and also signed by the state auditor. The state treasurer shall give a separate and additional bond in an amount to be fixed by the Governor, and with sureties approved by him, conditioned for the faithful performance of his duty as custodian of the state insurance fund. The state treasurer may deposit any portion of the said fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the

deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the state treasurer shall be collected by him and placed to the credit of the fund.

SURPLUS AND RESERVE.

SECTION 67. Ten per centum of the premiums collected from employers insured in the fund shall be set aside by the state insurance manager for the creation of a surplus, until such surplus shall amount to the sum of one hundred thousand dollars, and thereafter five per centum of such premiums, until such time as in the judgment of the state insurance manager such surplus shall be sufficiently large to cover the catastrophe hazard and all other unanticipated losses. The state insurance manager shall also set up and maintain a reserve adequate to meet anticipated losses and carry all claims and policies to maturity. The amount of such surplus and reserve shall be subject to the approval of the state insurance commissioner.

Note. — "Surplus and Reserve." For similar provisions see —

California. L. 1913, c. 176, sec. 40.
Kentucky. L. 1914, c. 73, sec. 21.
Maryland. L. 1914, c. 800, sec. 23.
New York. L. 1914, c. 41, sec. 92.

INVESTMENT OF SURPLUS OR RESERVE.

SECTION 68. The state insurance manager may invest any of the surplus or reserve funds belonging to the state insurance fund in the same securities and investments authorized for investments by savings banks. All such securities or evidences of in-

debtedness shall be placed in the hands of the state treasurer, who shall be the custodian thereof. He shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The state treasurer shall pay all warrants or vouchers drawn on the state insurance fund for the making of such investments when signed by the state insurance manager and by the state auditor. The state insurance manager, with the consent of the state auditor, may sell any of such securities, the proceeds thereof to be paid over to the state treasurer for said state insurance fund.

ADMINISTRATION EXPENSES.

SECTION 69. The entire expense of administering the state insurance fund shall be paid in the first instance by the state, out of moneys appropriated therefor. In the month of [ ] nineteen hundred and [ ], and annually thereafter in such month, the state insurance manager shall ascertain the just amount of expense incurred by him during the preceding calendar year, in the administration of the state insurance fund, including expense incurred for the examination, determination, and payment of losses and claims, and shall refund such amount to the state treasury.

Note.—"Administration expenses." This is based on—

California. L. 1913, c. 138, sec. 44.
New York. L. 1914, c. 41, sec. 94.

CLASSIFICATION OF RISKS AND ADJUSTMENT OF PREMIUMS.

SECTION 70. Employments insured in the state insurance fund shall be divided by the state insurance

manager, for the purposes of the said fund, into classes. Separate accounts shall be kept of the amounts collected and expended in respect to each such class for convenience in determining equitable rates; but for the purpose of paying compensation the state insurance fund shall be deemed one and indivisible. The state insurance manager shall have power to rearrange any of the classes by withdrawing any employment embraced in it and transferring it wholly or in part to any other class, and from such employments to set up new classes in his discretion. The state insurance manager shall determine the hazards of the different classes and fix the rates of premiums therefor based upon the total payroll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk.

Note. — "Classification of Risks and Adjustment of Premiums."

This is similar to —

California. L. 1913, c. 176, sec. 40.
New York. L. 1914, c. 41, sec. 95.

ACCOUNTS.

SECTION 71. The state insurance manager shall keep an accurate account of the money paid in premiums by each of the several classes of employments, and the expense of administering the state insur-

ance fund and the disbursements on account of injuries and deaths of employees in each of said classes, including the setting up of reserves adequate to meet anticipated and unexpected losses and to carry the claims to maturity; and also an account of the money received from each individual employer; and of the amount disbursed from the state insurance fund for expenses, and on account of injuries and death of the employees of such employer, including the reserves so set up.

DIVIDENDS.

SECTION 72. At the end of every year, and at such other times as the state insurance manager in his discretion may determine, a readjustment of the rate shall be made for each of the several classes of employments or industries. If at any time there is an aggregate balance remaining to the credit of any class of employment or industry which the state insurance manager deems may safely and properly be divided, he may in his discretion credit to each individual member of such class who shall have been a subscriber to the state insurance fund for a period of six months or more prior to the time of such readjustment such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates.

ASSESSMENTS.

SECTION 73. If the premiums fixed for any class and collected from its members are subsequently found by the state insurance manager to have been too small for any period, he may determine what

additional premiums are required from said class for said period, and may make assessments accordingly, and each of the members of such class shall be liable to the said manager to pay such assessment so made upon him within thirty days after notice thereof.

READJUSTMENT OF PAYROLLS.

SECTION 74. If the amount of premium collected from any employer at the beginning of any period is ascertained by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, an adjustment of the amount of such premium shall be made at the end of such period and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and if such wage expenditure for such period is less than the amount on which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such period, such employer shall immediately, upon being advised of the true amount of such premium due, forthwith pay to the state insurance manager an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such period.

POLICIES AND PAYMENT OF PREMIUMS.

SECTION 75. (1) Every employer insuring in the state insurance fund shall receive from the state insurance manager a contract or policy of insurance in a form to be approved by the state insurance commissioner.

(2) Except as otherwise provided in this act all premiums shall be paid by every employer who elects to insure with the state insurance fund to the state insurance manager on or before [July] first, nineteen hundred and [ ] and semi-annually thereafter or at such other times as may be prescribed by the state insurance manager. Receipts shall be given for such payments and the money shall be paid over to the state treasurer to the credit of the state insurance fund.

ACTIONS FOR COLLECTION IN CASE OF DEFAULT; PENALTY.

SECTION 76. If an employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the state or of the state insurance manager, and it shall be the duty of the state insurance manager forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due; and the same, when collected by the state insurance manager, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this act requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected to the state insurance manager.

Any employer who is in default for ten days in payment of any premium shall also be liable to a penalty as provided in section 48.

Note. — See note to section 48.

WITHDRAWAL FROM FUND.

SECTION 77. Any employer may, upon complying with subdivisions two, three, or four of section 45 of this act, withdraw from the fund by turning in his insurance contract or policy for cancelation, provided he is not in arrears for premiums due to the fund and has given to the state insurance manager written notice of his intention to withdraw thirty days before the expiration of the period for which he has elected to insure in said fund; and also provided that in case any employer so withdraws, his liability to assessments shall continue after the date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal.

Any employer so withdrawing may, however, terminate his entire liability by paying to the state insurance manager such sum as said manager may deem sufficient to cover such liabilities.

REINSURANCE.

SECTION 78. The state insurance manager may reinsure any risk, or any part thereof, and may enter into agreements of reinsurance in the same way and to the same extent as other insurance carriers.

Note. — "Reinsurance." For similar provision see —

California. L. 1913, c. 176, sec. 39.

AUDIT OF PAYROLLS.

SECTION 79. Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him, and shall furnish to the state insurance manager, upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as the state insurance manager shall require to verify the number of the employees and the amount of the payroll.

FALSIFICATION OF PAYROLL.

SECTION 80. An employer who shall wilfully misrepresent the amount of the payroll upon which the premiums chargeable by the state insurance fund are to be based shall be liable to the state in ten times the amount of the difference between the premiums paid and the amount the employer should have paid had his payroll been correctly computed; and the liability to the state under this section shall be enforced in a civil action by the state insurance manager in the name of the state, or in his own name, and any amount so collected shall become a part of the state insurance fund.

WILFUL MISREPRESENTATION.

SECTION 81. Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order to obtain payment out of such fund, shall be guilty of a misdemeanor.

INSPECTIONS.

SECTION 82. The state insurance manager shall have the right to inspect the plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the state insurance manager shall have free access to such premises during regular working hours, and at other reasonable times.

DISCLOSURES PROHIBITED.

SECTION 83. Information acquired by the state insurance manager or his officers or employees from employers or employees pursuant to this act shall not be open to public inspection, and any officer or employee of the state insurance manager who, without authority of the state insurance manager or pursuant to his rules, or as otherwise required by law, shall disclose the same shall be guilty of a misdemeanor.

Note. — "Disclosures Prohibited." This is similar to —
New York. L. 1914, c. 41, sec. 105.

APPROVAL OF PREMIUM RATES.

SECTION 84. All premium rates fixed by the state insurance manager for the state insurance fund shall be subject to the approval of the insurance commissioner in the same way and to the same extent as may be provided by law in the case of private insurance carriers.

Note. — "Approval of Premium Rates."
Cf. Massachusetts. L. 1911, c. 751, part V, sec. 3, as amended by L. 1912, c. 571, sec. 17, and L. 1912, c. 666, sec. 1.
New York. L. 1914, c. 16, sec. 1.

PAYMENT OF COMPENSATION.

SECTION 85. The state insurance manager shall submit each month to the state auditor an estimate of the amount necessary to meet the current disbursements for insurance losses and workmen's compensation from the state insurance fund, during each succeeding calendar month, and when such estimate shall be approved by the state auditor, the state treasurer is authorized to pay the same out of the state insurance fund. At the end of each calendar month the state insurance manager shall account to the state auditor for all moneys so received, furnishing proper vouchers therefor.

Note — "Payment of Compensation."

This is similar to —

California. L. 1913, c. 176, sec. 44.

REPORTS OF STATE INSURANCE MANAGER.

SECTION 86. The state insurance manager shall file with the state insurance commissioner such reports as may be required of other insurance carriers; and shall also, whenever so requested by the state insurance commissioner, furnish him with such further information as he may need for the performance of the duties imposed upon him by this act.

VIII.

REPORTS, DEFINITIONS, AND GENERAL PROVISIONS.

REPORT OF ACCIDENTS BY EMPLOYERS.

SECTION 87. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received

by his employees in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an injury causing absence from work for one day or more, a report thereof shall be made in writing to the Industrial Accident Board on blanks to be procured from the Board for the purpose.

Upon the termination of the disability of the injured employee, the employer shall make a supplemental report upon blanks to be procured from the Board for that purpose. If the disability extends beyond a period of sixty days, the employer shall report to the Board at the end of such period that the injured employee is still disabled, and upon the termination of the disability shall file a final supplemental report as provided above.

The said reports shall contain the name and nature of the business of the employer, the situation of the establishment, the name, age, sex, wages, and occupation of the injured employee, and shall state the date and hour of the accident causing the injury, the nature and cause of the injury, and such other information as may be required by the Board.

Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than [ ] dollars for each offense.

Within sixty days after the termination of the disability of the injured employee, the employer or other party liable to pay the compensation provided for by this act shall file with the Board a statement showing the total payments made or to be made for compensation and for medical services for such injured employee.

Note. — Reports of accidents. This section is largely taken from —

Massachusetts. L. 1911, c. 751, part III, sec. 18, —

as amended by —

Massachusetts. L. 1913, c. 746.

Similar provisions are found in —

California. L. 1913, c. 176, sec. 71.
Connecticut. L. 1913, c. 138, part B, sec. 20.
Michigan. L. 1912, No. 10, part III, sec. 17.
Ohio. L. 1913, c. 000, sec. 52.
Oregon. L. 1913, c. 112, sec. 29.
Washington. L. 1911, c. 74, sec. 14.

"for one day or more." This is found in —

Connecticut. L. 1913, c. 138, part B, sec. 20.

INTERSTATE COMMERCE.

SECTION 88. This act shall affect the liability of employers to employees engaged in interstate or foreign commerce or otherwise only so far as the same is permissible under the laws of the United States.

Note. — Similar provisions are found in —

California. L. 1913, c. 176, sec. 86 (*c*).
Connecticut. L. 1913, c. 138, part B, sec. 40.
Illinois. L. 1913 (c. 40, R.L.), sec. 5.
Iowa. L. 1913, c. 147, sec. 22.
Louisiana. L. 1914, No. 20, sec. 30.
Maryland. L. 1914, c. 800, sec. 33.
Michigan. L. 1912, No. 10, part VI, sec. 4.
Minnesota. L. 1913, c. 467, sec. 8.
New York. L. 1914, c. 41, sec. 114.
Ohio. L. 1913, c. 000, sec. 1465–98.

Washington. L. 1911, c. 74, sec. 18.
West Virginia. L. 1913, c. 10, sec. 52.

REPORTS OF INDUSTRIAL ACCIDENT BOARD.

SECTION 89. Annually on or before the first day of February, the Board shall make a report to the legislature which shall include a properly classified statement of the expenses of the Board, together with any other matters which the Board deems proper to report to the legislature, including any recommendations it may desire to make. The Board shall, at the same time, send a copy of said report to the state insurance commissioner, and also to the state insurance manager.

DEFINITIONS.

SECTION 90. In this act, unless the context otherwise requires:

(*a*) "Employer," unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. If the employer is insured it includes his insurer so far as applicable.

(*b*) "Workman" is used as synonymous with "employee," and means any person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. It does not include a person whose employment is

purely casual or not for the purpose of the employer's trade or business, or whose remuneration exceeds [ ] dollars a year. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependents as herein defined, if the context so requires, or, where the employee is a minor or incompetent, to his committee or guardian or next friend.

(*c*) "Injury" or "personal injury" includes death resulting from injury within [ ] years.

(*d*) The words "personal injury by accident arising out of and in the course of such employment" shall include an injury caused by the wilful act of a third person directed against an employee because of his employment.

They shall not include a disease except as it shall result from the injury.

(*e*) "Employment," in the case of private employers, includes employment only in a trade or occupation which is carried on by the employer for the sake of pecuniary gain.

Public employment means employment by the state or by a county, city, or town, or by any of the other public corporations mentioned in section 2.

It does not include the employment of public officials who are elected by popular vote or who receive salaries exceeding [ ] dollars a year.

(*f*) The word "Board," whenever used in this act, unless the context shows otherwise, shall be taken to mean the Industrial Accident Board.

(*g*) "Partial disability." Diminished ability to obtain employment owing to disfigurement resulting from an injury may be held to constitute partial disability.

Note. — "disfigurement." This is found in —
Wisconsin. L. 1913, c. 599, sec. 2394–9, cl. (5).

(*h*) "Wages" shall include the market value of board, lodging, fuel, and other advantages which can be estimated in money which the employee receives from the employer as a part of his remuneration.

"Wages" shall not include any sums which the employer has paid to the employee to cover any special expenses entailed on him by the nature of his employment.

(*i*) "Insurance Carrier" shall include the state insurance manager representing the state insurance fund and also stock corporations or mutual associations from any of which employers have obtained workmen's compensation insurance or guaranty insurance in accordance with the provisions of this act.

(*j*) Any term shall include the singular and plural and both sexes where the context so requires.

UNCONSTITUTIONAL PROVISIONS.

SECTION 91. If any part or section of this act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole, or any part thereof which can be given effect without the part so decided to be unconstitutional or invalid.

PENALTIES FOR FALSE REPRESENTATIONS.

SECTION 92. If for the purpose of obtaining any benefit or payment under the provisions of this act,

either for himself or for any other person, any one wilfully makes a false statement or representation, he shall be guilty of a misdemeanor and liable to a fine of not exceeding [ ] dollars, and he shall forfeit all right to compensation under this act after conviction for such offense.

PRIOR INJURIES.

SECTION 93. The provisions of this act shall not apply to injuries sustained, or accidents which occur, prior to the taking effect hereof.

RULES OF CONSTRUCTION.

SECTION 94. (*a*) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(*b*) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

PRIOR STATUTES; REPEAL.

SECTION 95. All acts and parts of acts inconsistent with this act are hereby repealed.

TITLE OF ACT.

SECTION 96. This act may be cited as the Uniform Workmen's Compensation Act.

TIME OF TAKING EFFECT.

SECTION 97. Part VII of this act shall take effect on the first day of July, nineteen hundred and [ ]; the remainder thereof shall take effect on the first day of January, nineteen hundred and [ ].

APPENDIX.

Elective Act.

NOTE. — If an elective act is required the following clauses may be used in addition to those contained in the foregoing compulsory act:

ELECTION TO COME UNDER THIS ACT.

ELECTION BY EMPLOYER AND EMPLOYEE.

SECTION 1. This act, except sections [ ], relating to defenses, and section [ ], relating to reports, shall not apply to any employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in this act, and shall bind the employee himself, his widow and next of kin and dependents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency.

Every contract of hiring — verbal, written, or implied — now in operation or made or implied prior to the time limited for this act to take effect shall after this act takes effect be presumed to continue subject to the provisions of this act unless either party shall at any time prior to accident, in writing, notify the other party to such contract and the Board that the provisions of this act, other than sections [ ], are not intended to apply.

Every contract of hiring — verbal, written, or implied — made subsequent to the time provided for this

act to take effect shall be presumed to have been made subject to the provisions of this act, unless there be, as a part of said contract, au express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and the Board, that the provisions of this act other than sections [ ] are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this act and to be bound thereby. In the employment of minors this act shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

The agreement for the operation of the provisions of this act other than sections [ ] may be terminated by either party upon sixty days' notice to the other and to the Board in writing prior to any accident.

Note. — "Unless prior to the injury they shall have so elected." The following acts are elective:

Connecticut. L. 1913, c. 138, part B, sec. 1.
Illinois. L. 1913 (c. 40, R.L.), sec. 1.
Iowa. L. 1913, c. 147, sec. 1.
Kansas. L. 1913, c. 216, sec. 44.
Kentucky. L. 1914, c. 73, sec. 32.
Louisiana. L. 1914, No. 20, sec. 3 (1).
Massachusetts. L. 1911, c. 751, part I, sec. 4.
Michigan. L. 1912, No. 10, part I, sec. 3.
Minnesota. L. 1913, c. 467, sec. 9.
Nebraska. L. 1913, c. 198, sec. 9.
Nevada. L. 1913, c. 111, secs. 1, 3.
New Hampshire. L. 1911, c. 163, sec. 3.
New Jersey. L. 1911, c. 95, sec. 7.
Oregon. L. 1913, c. 112, secs. 10, 11.

Rhode Island. L. 1912, c. 831, part I, sec. 4.
Texas. L. 1913, c. 179, part III, secs. 6, 19.
Wisconsin. L. 1913, c. 599, sec. 2394–5.
West Virginia. L. 1913, c. 10, sec. 22.

"shall be presumed to have been made."

New Jersey was the first state in which employer and employees were presumed to have elected to be under the act. The following contain such a provision:

Connecticut. L. 1913, c. 138, part B, sec. 2.
Iowa. L. 1913, c. 147, sec. 1.
Kansas. L. 1913, c. 216, sec. 45.
Louisiana. L. 1914, No. 20, sec. 3.
Minnesota. L. 1913, c. 467, sec. 11.
Nebraska. L. 1913, c. 198, sec. 12.
Nevada. L. 1913, c. 111, sec. 1.
Wisconsin. L. 1913, c. 599, sec. 2394–5.

DEFENSES IN CASE EMPLOYER DOES NOT ELECT TO COME UNDER THIS ACT.

SECTION 2. If an employee has elected as aforesaid to come under this act and his employer has elected as aforesaid not to come under this act, then if an action is brought by the employee or his next of kin or personal representative to recover for personal injuries sustained after such election by the employer arising out of and in the course of his employment, it shall not be a defense —

(*a*) that the employee was negligent;

(*b*) that the injury was caused by the negligence of a fellow-employee;

(*c*) that the employee had assumed the risk of the injury.

DEFENSES IN CASE EMPLOYEE DOES NOT ELECT TO COME UNDER THIS ACT.

SECTION 3. If an employer has elected as aforesaid to come under this act and his employee has elected as aforesaid not to come under this act, then if an action is brought by the employee to recover damages for personal injuries sustained after the employee has so elected, and arising out of and in the course of his employment, the employer shall have all the defenses which he would have had if this act had not been enacted.